No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

AMWEST SAVINGS ASSOCIATION, a Texas state savings and loan association, and HSA MORTGAGE COMPANY,

Petitioners,

v.

STATEWIDE CAPITAL, INC., GAYLE SCHRODER, CLAY STONE, MELVIN POWERS, JOE LONG, and GORDON BEYERLEIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do payments made under an Assistance Agreement by the Federal Deposit Insurance Corporation to the party in contract with the Federal Deposit Insurance Corporation preclude the recovery of damages caused by third party wrongdoers?

2. Recognizing that Assistance Agreements are designed to assure the orderly liquidation of failed federally insured financial institutions, should its designed protections be ignored in favor of third party wrongdoers that seek to prosper through fraudulent conduct at the ultimate expense of the American taxpayers?

3. Are third party wrongdoers intended to be beneficiaries of payments made by the Federal Deposit Insurance Corporation under an Assistance Agreement, such that the recipients of those payments may not proceed against the wrongdoers either on its own behalf or on behalf of the Federal Deposit Insurance Corporation?

PARTIES TO THE PROCEEDING

The following are parties to the proceeding:

AmWest Savings Association
Appellant/Plaintiff

HSA Mortgage Company
Appellant/Plaintiff

Statewide Capital, Inc.
Appellee/Defendant

Gayle Schroder
Appellee/Defendant

Clay Stone
Appellee/Defendant

Melvin Powers
Appellee/Defendant

Joe Long
Appellee/Defendant

Gordon Beyerlein
Appellee/Defendant

Pursuant to Rule 29.6, the following are affiliated companies of the petitioners:

The Adam Corporation/Group
Second tier parent of appellant AmWest Savings Association

TAC Financial Corporation
First tier parent of appellant AmWest Savings Association

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not reported and is set forth in the Appendix. App. 1-15. The judgments of the United States District Court for the Southern District of Texas are not reported and are set forth in the Appendix. App. 16-46.

JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254. The United States Court of Appeals for the Fifth Circuit issued its Opinion in this case on July 10, 1998, and denied the petition for rehearing on August 13, 1998. This petition was filed within 90 days of the denial, and is timely.

STATEMENT OF THE CASE

A. The origin of the Assistance Agreement.

In 1988, AmWest Savings Association ("AmWest") purchased the assets of eleven failed financial institutions from the Federal Savings and Loan Insurance Corporation ("FSLIC"), then the receiver for these thrifts. App. 2. The Federal Deposit Insurance Corporation ("FDIC") later succeeded the FSLIC as receiver.[1] The purchases

[1] For the sake of simplicity, all future references will be to the "FDIC".

were accomplished through and governed by a contract known as the "Assistance Agreement."[2] App. 2.

At the time AmWest and the FDIC entered into the Assistance Agreement, the FDIC's insurance fund did not contain enough money to cover insured deposits. App. 2. Therefore, in order to reduce the amount of financial assistance that would have been necessary through immediate liquidation, the FDIC required purchasers, such as AmWest, to recapitalize the insolvent thrifts and manage them in such a way as to minimize the FDIC's exposure. App. 2. This method of liquidation was necessary to assure payment of insured deposits.

The records of the failed thrifts were in such poor condition that the FDIC could not determine the value of the assets. Further, the FDIC did not allow AmWest to conduct a due diligence review. Instead, recognizing the significant risk of purchasing unknown assets and liabilities, the FDIC insured the "book value" of the assets. In exchange, AmWest was required to invest $80 million to recapitalize the failed thrifts. Pursuant to the terms of the Assistance Agreement, the purchased assets were either treated as "covered" or "uncovered." If an asset was "covered," upon its disposition (by sale or otherwise), the FDIC would make up any difference between its recognized value and the book value of the asset. App. 2-3.

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[2] The referenced pages of the Assistance Agreement are included in the appendix.

B. AmWest's duties and obligations under the Assistance Agreement.

Under the Assistance Agreement, AmWest became the FDIC's liquidating agent for the covered assets and was charged with liquidating the assets in such a way as to maximize recovery for the FDIC and minimize the FDIC's losses. App. 50-51. To summarize, the FDIC:

- could hold AmWest accountable for maximizing recovery and minimizing losses associated with the assets covered by the Assistance Agreement (App. 50-51);
- could order AmWest to sell the assets to it or to anyone at any time for market value, *i.e.*, AmWest held and managed these assets subject to the FDIC's direction (App. 66);
- retained control over all litigation involving any covered asset, and the power to compel AmWest to initiate a lawsuit in its own name or in the name of the FDIC (App. 78-79);
- insured AmWest against any loss in value from book value with regard to any covered assets, whether the loss in value occurred prior or subsequent to AmWest's purchase (App. 53, 58-61);
- retained the power to approve AmWest's sale of most covered assets, and to deny AmWest assistance should any asset be sold without approval (App. 71-74); and
- retained an 80% participation in any "profits" received on the sale of covered assets above the book value at the time of the sale, leaving AmWest with a 20% interest in such proceeds (App. 61-63).

Importantly, AmWest was also required to set up an account (the Special Reserve Account – hereinafter "SRA") to account for all assistance payments made by the FDIC as well as all debits and credits associated with the management and liquidation of the covered assets. App. 58-64. In essence, every time AmWest sold an asset for less than its book value, the SRA was debited. In the unlikely event AmWest sold an asset for more than its book value, the SRA was credited. For its efforts, AmWest was paid a management fee.

C. The defendants conspired to defraud AmWest.

AmWest hired Defendant Clay Stone ("Stone") to manage and dispose of certain covered assets governed by the Assistance Agreement. App. 3. Because the assets at issue were operating at a loss, AmWest planned to liquidate the assets through a sealed-bid sale. App. 3.

Rather than honoring the fiduciary duties he admittedly owed AmWest by conducting the sale in the best interest of AmWest, the evidence showed, and the jury unanimously found, that Stone conspired throughout the bidding process with defendants Gordon Beyerlein, Statewide Capital, Inc. ("Statewide"), Gayle Schroder, Melvin Powers, and Joe Long to insure that Statewide obtained the subject assets from AmWest at a price that was substantially less than their fair market value. App. 4-5.

As required by the terms of the Assistance Agreement, AmWest filed this lawsuit to collect damages caused by the wrongful actions and omissions of the defendants. The suit was later ratified by the FDIC in a

letter agreement entered into with AmWest with respect to this litigation. App. 85-91. After a five week trial, the jury found for AmWest on all issues and claims, and awarded AmWest damages in excess of $38 million. App. 5. All funds recovered from the defendants will be subject to the terms of the Assistance Agreement, the July 12, 1991 letter agreement by and between AmWest and the FDIC, and ultimately accounted for through the SRA.

SUMMARY OF THE ARGUMENT

The Fifth Circuit affirmed the trial court's final take nothing judgment based on the erroneous conclusion that AmWest was not authorized to bring suit under the Assistance Agreement. The Fifth Circuit's decision was based on its misinterpretation of § 7 of the Assistance Agreement – which is not controlling. Instead, § 3 of the Assistance Agreement, which was not addressed by the Fifth Circuit, not only authorized AmWest to bring suit, but required it to do so.

The lower courts' rulings have particular significance beyond the parties and claims in this proceeding. The lower courts failed to recognize and account for the circumstances surrounding the formation of the Assistance Agreement that were recognized in *FSLIC v. Reeves, et al.*, 816 F.2d 130 (4th Cir. 1987). In particular, the lower courts ignored the fact that AmWest was required to immediately invest $80 million to recapitalize the failed thrifts it purchased and to do everything it could (including the pursuit of these claims) to minimize the FDIC's exposure. In exchange, the FDIC insured the value of the assets

AmWest purchased. Those payments accrued to the benefit of AmWest and are not relevant to the issue of compensable injury caused by the defendants. As a result, if the lower court's opinions are upheld, the benefits of the Assistance Agreement will be shifted from AmWest to the defendants, and the governmental framework established to assure the orderly liquidation of failed federally insured financial institutions would be totally undermined.

ARGUMENT

A. Section 3 of the Assistance Agreement authorized and required AmWest to pursue the claims against the defendants.

Under § 3 of the Assistance Agreement, the specific applicable terms of which are detailed below, the FDIC's payment to AmWest, and the timing thereof, is of no consequence. Pursuant to § 3, AmWest was required to account for all losses and gains with respect to the covered assets. App. 58-67. The obligation permeated the Assistance Agreement, meaning it was not limited to any one transaction or claim, but was designed to account for all covered asset transactions and claims concerning the thrifts AmWest purchased. Debits and credits were made to the SRA as assets were liquidated and claims pursued. To that end, AmWest was required to provide a statement to the FDIC on a quarterly basis, and the FDIC would then make payments based on the quarterly reports. Upon the termination of the Assistance Agreement, AmWest was required to provide a final accounting, and

continue pursuit of claims that could affect the SRA. App. 82-84. Therefore, the fact that the FDIC reimbursed AmWest with respect to the assets at issue is of no consequence. The Assistance Agreement, and specifically the SRA, was designed to accommodate the ongoing ten year relationship between AmWest and the FDIC.

B. Section 3(b)(2) authorized AmWest to bring suit.

As discussed above, any recovery realized by AmWest in this suit will be governed by the Assistance Agreement and the July 12, 1991 letter agreement by and between AmWest and the FDIC. Section 3(b)(2) of the Assistance Agreement provides:

> (b) *Credits to Special Reserve Account I.* The ACQUIRING ASSOCIATION shall promptly credit each of the following items to Special Reserve Account I, to the extent that such item was not shown as an asset on the Books and Records, as adjusted by the Initial Audit: . . .
>
> (2) *Covered Asset Amount.* An amount equal to the sum of (i) the excess, if any, of the Net Proceeds Received with respect to a Covered Asset over the sum of (A) the Book Value of such Covered Asset, (B) the amount of any write-down of any such Covered Asset pursuant to § 4 and (C) any Covered Asset Recovery with respect to such Covered Asset: . . . (App. 61).

It is undisputed that this case involves "Covered Assets." "Net Proceeds Received" as used in § 3(b)(2) is defined in the Assistance Agreement as amounts that are received upon the "Liquidation" of a "Covered Asset" or a "Claim." App. 55. The Assistance Agreement defines

"Liquidation" to include "the reduction to judgment of any Claim," and "Claim" as "any claim, demand, cause of action or judgment." App. 54, 52. Therefore, recovery from any claim that affects a covered asset must be accounted for through the SRA – which is clearly the case here.

C. Section 3(b)(4) authorized AmWest to bring suit.

Any recovery realized by AmWest would also be credited to the SRA pursuant to § 3(b)(4) of the Assistance Agreement which provides:

> (4) *Offset Gains.* The amounts which the ACQUIRING ASSOCIATION recovers from other than the CORPORATION, whether by counterclaim, offset, insurance settlement, or otherwise, with respect to any Claim or other item with respect to which the ACQUIRING ASSOCIATION debited Special Reserve Account. (App. 63).

Therefore, since recoveries from this suit would be the result of a claim that affects the amount of the assistance payment made by the FDIC, it must be accounted for through the SRA under § 3(b)(4).

D. Recital G and § 15 of the Assistance Agreement authorized AmWest to bring suit.

Recital G of the Assistance Agreement requires AmWest to use its best efforts to manage the assets in a manner that will minimize the FDIC's exposure. App. 50-51. As a result, because this suit affects the amount of the FDIC's assistance payments to AmWest (i.e., the

amount recovered from the defendants will be credited to the SRA), AmWest was required and authorized to bring this suit under Recital G.

Additionally, pursuant to § 15(d) of the Assistance Agreement, entitled "Plaintiff Litigation," AmWest had the authority to bring any claim or cause of action that could result in a debit to the SRA. App. 77. As discussed, this suit involved damages relating to covered assets, and the recovery realized from this case will affect the payments made by the FDIC through the SRA.

Finally, the July 12, 1991 letter agreement evidences that AmWest not only obtained the approval of the FDIC as contemplated by § 15, but also evidences that the FDIC ratified the suit. App. 85-91.

E. Section 7 of the Assistance Agreement authorized AmWest to bring suit.

The Fifth Circuit focused solely on § 7 of the Assistance Agreement when it determined that AmWest was not authorized to bring this lawsuit. App. 7. However, the Fifth Circuit failed to acknowledge all of the defined terms contained in § 7 when it incorrectly determined that the section did not give AmWest the authority to bring this suit.

The premise for the Fifth Circuit's conclusion with regard to § 7 is that the claims at issue are not ones for which the FDIC was required to indemnify AmWest. App. 7. However, since this suit concerned "Unassumed Liabilities and Claims," the FDIC was required to indemnify AmWest under § 7(a)(1). App. 67-70. The fact that the

FDIC was required to indemnify AmWest for the claims against the defendants is also evidenced by the June 12, 1991 letter agreement between AmWest and the FDIC. App. 85-91.

It is also important to note that Statewide sued AmWest. Although AmWest filed suit first, Statewide filed and submitted to the jury a counterclaim against AmWest for over $30 million. Section 7(a)(1) of the Assistance Agreement requires the FDIC to indemnify AmWest for any contract claim asserted against AmWest. App. 67-69. Therefore, had Statewide filed suit first, under § 7(b) of the Assistance Agreement, AmWest would have been required to pursue all Related Claims, which of course would simply have been the same claims that the jury awarded AmWest approximately $40 million. App. 67-70. The difference between an enforceable verdict and an unenforceable one should not be determined by which party filed suit first.

F. The Assistance Agreement is a collateral source.

Under both Texas and federal common law, a defendant is not entitled to a credit for payments from sources that are independent of the defendant or another tortfeasor. The overriding principle is not "single satisfaction" but, if there is a windfall (which there is not in this case), it should go to the victim – not the wrongdoer. *See Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1429 (7th Cir. 1986) (stating that, as between conferring a windfall to a victim of wrongdoing or the wrongdoer, the victim is the "logical choice").

The collateral source rule is not restricted to private insurance Comment D to the Restatement (Second) of the Torts § 920A provides "[t]he law does not differentiate between the nature of the collateral source benefits, so long as they did not come from the defendant or a person acting for him." The collateral source rule has also been held to apply to an indemnity payment under an escrow agreement. *See Alport v. Ritter*, 144 F.3d 1163 (8th Cir. 1998); *see also Phillips v. Western Co. of North America*, 953 F.2d 923, 929 (5th Cir. 1992) (stating that the collateral source rule "generally denies to a tortfeasor a reduction in its liability by any amounts the plaintiff receives from a source collateral to, or independent of, the tortfeasor"); *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 582 (Tex. App. – Houston [1st Dist.] 1992, no writ) (holding that application of the collateral source rule depends "less upon the source of the funds than upon the character of the benefits received" and that the rule applies not only to forms of protection that were purchased by the plaintiff but also to all sources of income that are readily identifiable as "independent," including gifts and compensation paid for by another, such as workers' compensation); *Green v. Denver & Rio Grande Western R. Co.*, 59 F.3d 1029, 1032 (10th Cir. 1995) (holding that payments "made from the public treasury" are a collateral source).

The financial protection that the FDIC provided to AmWest was necessitated by the unreliable book value of the assets AmWest purchased and the fact that the FDIC did not allow AmWest to conduct a due diligence of the assets it purchased. Historically, the lack of dependability of a failed financial institution's books and records forms the basis for many of the protections afforded the FDIC

and successor institutions; such as those contained in 12 U.S.C. § 1823(e), the common-law *D'Oench* doctrine, the federal holder in due course rule, and the extended limitations period. *See, e.g., Langley v. FDIC*, 484 U.S. 86, 108 S. Ct. 396 (1987) (stating policy reasons for 12 U.S.C. § 1823(e) and *D'Oench*); *FDIC v. Bledsoe*, 989 F.2d 805, 809, 811 (5th Cir. 1993) (discussing rationale for extended statutes of limitations); and *Federal Sav. and Loan Inc. Corp. v. Cribbs*, 918 F.2d 557, 559 (5th Cir. 1990) (discussing rationale for federal holder in due course rule). These protections have also been extended to purchasers of failed bank assets. *See Bledsoe*, 989 F.2d at 810-811 (holding that extended limitations period applies to assignees of the FDIC); *Cribbs*, 918 F.2d at 559 (extending federal holder in due course status to assignees of the FSLIC); *Bell and Murphy & Assoc., Inc. v. Long Trusts*, 894 F.2d 750, 754 (5th Cir. 1990), *cert. denied*, 498 U.S. 895 (1990) (affording assignees of the FDIC the protections of *D'Oench* and 12 U.S.C. § 1823(e)).

Hence, the only distinction between typical insurance and the FDIC assistance in this case, is that AmWest paid its premium when it made its initial $80 million infusion to recapitalize the failed thrifts. The fact that AmWest was reimbursed, after the fact, for the injury it suffered from the defendants wrongful conduct does not negate the injury. Thus, if any analogy is to be drawn, the FDIC assistance should be considered a collateral source. Finally, because any recovery that is ultimately realized will go into the SRA (which will minimize the financial assistance needed from the FDIC), there is no unexpected gain, windfall or unjust enrichment. *See FSLIC v. Reeves, et al.*, 816 F.2d 130, 133 (4th Cir. 1987).

G. At a minimum, AmWest has the right to prosecute the claims under the doctrine of subrogation.

Under Texas law, upon payment of the "incremental amount" by the FDIC, AmWest's claims must be "treated as still subsisting" for the benefit of the FDIC which, upon payment, became subrogated to AmWest's claims. *See Texas Co. v. Miller*, 165 F.2d 111, 115 (5th Cir. 1947) ("The right of subrogation is not dependent upon contract, agreement, assignment, or stipulation, or upon privity or strict suretyship. . . . "); *Yonack v. Interstate Sec. Co.*, 217 F.2d 649 (5th Cir. 1954) (application of the doctrine is "the purest of equities . . . .").

In *Lexington Ins. Co. v. Gray*, 775 S.W.2d 679, 683 (Tex. App. – Austin 1989, writ denied), the court stated succinctly the difference between assignment and subrogation as follows:

> Although often confused, the doctrines of subrogation and assignment are not the same . . . . Subrogation is the act of the law, depending not upon contract, but upon principles of equity, while assignment is the act of the Parties, and depends generally on intention. *Subrogation presupposes an actual payment and satisfaction of the debt or claim to which the party is subrogated, although the remedy is kept alive in equity for the benefit of one who made the payment under circumstances entitling him to contribution or indemnity,* while assignment necessarily contemplates the *continued existence* of the debt or claim assigned.
>
> (Emphasis added)

As an alternative to contractual subrogation, AmWest is also entitled to pursue the claims under the doctrine of

equitable subrogation. *See Interfirst Bank Dallas, N.A. v. U.S. Fidelity & Guar. Co.*, 774 S.W.2d 391, 397 (Tex. App. – Dallas 1989, writ denied), quoting *Miller*, 165 F.2d at 115. Here, the FDIC paid AmWest's claims against the defendants or, conversely, the defendants' debt to AmWest. Consequently, even assuming that the FDIC's payment somehow extinguished AmWest's claims against the defendants – and it did not – AmWest's remedies continue under the doctrine of subrogation for the benefit of the FDIC, which authorized AmWest to pursue recovery on the FDIC's behalf.

H. From a policy perspective, the lower courts' rulings have troubling overtones.

One of the more troubling aspects of the lower courts' rulings is the simple fact that the defendants have been relieved from the damages the jury unanimously found they caused. Further, taken to its logical conclusion, parties acting under other assistance agreements (and perhaps other similar contracts with the United States government) could possibly be precluded from bringing an action to recover on a note or guaranty. As a result, the FDIC would be put to the choice of collecting on the asset itself, or completely foregoing any recovery on assets managed by its agent. Because of the lack of resources, this is exactly what the FDIC was trying to avoid when it entered into the Assistance Agreement. As a result, if the FDIC is not able to go after each

wrongdoer, note holder or guarantor, the ultimate loser, as in this case, will be the American public.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant the Petition.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20252

(Filed Jul. 10, 1998)

AMWEST SAVINGS ASSOCIATION, a Texas state savings and loan association, and HSA MORTGAGE COMPANY,

Plaintiffs-Appellants,

VERSUS

STATEWIDE CAPITAL, INC., GAYLE SCHRODER, CLAY STONE, MELVIN POWERS, JOE LONG, and GORDON BEYERLEIN,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas

Before POLITZ, Chief Judge, and DAVIS and DUHÉ, Circuit Judges. W. EUGENE DAVIS, Circuit Judge:

Appellants Amwest Savings Association ("Amwest") and HSA Mortgage Company ("HSA") appeal from the district court's "take nothing" judgment against them. For the reasons set out below, we affirm the judgment of the district court.

I.

In 1988, Amwest entered into an agreement to purchase the assets of eleven failed savings and loan associations from the Federal Savings and Loan Insurance Corporation ("FSLIC").[1] At that time, as a result of the failure of numerous savings and loans, FSLIC's insurance fund contained insufficient monies to cover insured deposits. In order to generate revenue, the Federal Home Loan Bank Board took over the portfolios of insolvent savings and loans associations and sold those portfolios to larger savings and loan associations such as Amwest.

In connection with Amwest's purchase of the assets of the failed savings and loans, Amwest and FSLIC entered into an "Assistance Agreement."[2] Under the Assistance Agreement, Amwest was to liquidate unprofitable assets and manage profitable assets, sharing revenues with the FDIC. Amwest was also guaranteed to recover the book value of certain "covered" assets upon the sale of such assets. Thus, if Amwest sold a "covered" asset for less than its book value, the FDIC would pay Amwest the difference between the asset's purchase price and its book value. If Amwest sold a "covered" asset for more than its book value, Amwest would split the profit

---

[1] The assets were actually purchased by NuOlney Savings, which later changed its name to Amwest.

[2] FSLIC was dissolved by the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") which was passed in August 1989. The Federal Deposit Insurance Corporation ("FDIC") succeeded FSLIC as a party to the Assistance Agreement after FIRREA was passed. For simplicity, this opinion will hereinafter refer to the federal regulator involved as the FDIC.

with the FDIC under a formula set out in the Assistance Agreement.

BancHome was one of the insolvent institutions whose assets were purchased by Amwest. HSA, A-1, Inc., and A-1 Mobile Homes, Inc. (collectively, the "Mobile Home Subsidiaries") were wholly-owned subsidiaries of BancHome and were among BancHome's assets that were purchased by Amwest. The mobile home assets of the Mobile Home Subsidiaries were determined to have a book value of $250 million.

Amwest hired defendant Clay Stone to manage the Mobile Home Subsidiaries. Between October 1988 and December 1989, Stone operated the Mobile Home Subsidiaries at a loss. Amwest decided to liquidate the assets of the Mobile Home Subsidiaries, and the FDIC approved its decision. In December 1989, Amwest began taking bids on the mobile home assets, eventually accepting the bid of defendant Statewide Capital, Inc. ("Statewide").

The parties agreed that there would be more than one closing due to the complexity of the transaction. The first closing took place on June 12, 1990. On that date, the parties signed an asset purchase agreement. The second closing took place on August 31, 1990. At this closing, a dispute arose concerning $14 million in loans in HSA's portfolio that HSA sold in mid-August without Statewide's knowledge. Statewide claimed that under the asset purchase agreement Statewide was to purchase all of the loans in HSA's portfolio and demanded a "credit" towards the purchase price of the remaining loans in the portfolio as some share of the profit from the sale of the loans. The dispute was resolved when Amwest offered

Statewide a final closing price of $71,239,094 on the remaining loans, which reflected a $5.6 million credit towards the original purchase price of those loans. Statewide accepted Amwest's offer and wired the funds to close the deal. Later, Amwest discovered that it had made a $2,852,722 math error in calculating the amount of the credit, and had thereby inadvertently issued Statewide a $2.8 million "double" credit. Amwest demanded immediate repayment of $2.8 million, but Statewide refused to comply. The final closing occurred on September 30, 1990.

On December 19, 1990, Amwest and HSA (collectively, "Amwest") filed suit against Statewide, Stone, Gordon Beyerlein, then-general counsel of HSA, and three principals of Statewide – Gayle Schroder, Melvin Powers, and Joe Long, alleging that they had conspired to manipulate the bidding process in Statewide's favor and to ensure that Statewide would obtain the mobile home assets at less than fair market value. Amwest also alleged that Stone had engaged in expense account abuse by obtaining reimbursement for personal expenses. In addition, Amwest sought recovery from Statewide of the $2.8 million "double" credit.

Prior to the submission of the case to the jury, the court granted judgment as a matter of law in favor of Statewide on Amwest's claim for the recovery of the $2.8 million "double" credit and in favor of Stone on Amwest's expense account abuse claim. On July 6, 1995, after a five-week trial, the jury found in favor of Amwest on each of its claims. Specifically, the jury found that Stone and Beyerlein had made several misrepresentations, including misrepresentations concerning the fair market value of the mobile home assets, and that Stone

and Beyerlein had breached their respective fiduciary duties to Amwest and HSA. The jury also found that Stone, Beyerlein and the other defendants had conspired to varying degrees to commit fraud and breach of fiduciary duty. Finally, the jury found that Statewide had breached the asset purchase agreement in a number of respects. The upshot of defendants' collective wrongdoing was to effectively lower the purchase price of the mobile home assets, thereby increasing the amount that the FDIC paid Amwest to make up the difference between the book value of the assets and the amount that Amwest received for them.

The jury awarded Amwest approximately $22 million in compensatory damages and $16.5 million in punitive damages. Defendants subsequently filed renewed motions for judgment as a matter of law, or, in the alternative, for a new trial. On April 2, 1996, the district court granted defendants' renewed motions for judgment as a matter of law on the ground that Amwest had not suffered any damages because it had been fully compensated by the FDIC for the losses it sustained as a result of defendants' conduct. Nearly a year later, the district court conditionally granted defendants' motions for a new trial on grounds that Amwest had engaged in pre-trial misconduct and that certain jury instructions were fatally defective. On February 25, 1997, the court entered a "take nothing" judgment against Amwest.

On appeal, Amwest argues that the district court erred in granting defendants' renewed motions for judgment as a matter of law and in conditionally granting defendants' motions for a new trial. Amwest also argues that the district court erred in granting Statewide's

motion for judgment as a matter of law on Amwest's claim for recovery of the $2.8 million "double" credit and on Stone's motion for judgment as a matter of law on Amwest's expense account abuse claim.

II.

The district court granted defendants' renewed motions for judgment as a matter of law in favor of defendants on the ground that Amwest had not suffered any damages. We agree that Amwest failed to show that it suffered any damages as a result of defendants' wrongdoing with respect to the purchase price of the mobile home assets.[3] The book value of the mobile home assets was $250 million dollars. Although Amwest received less from Statewide than it would have if not for defendants' wrongdoing, the FDIC fully compensated Amwest for its loss when it made up the difference between the purchase price of the assets and their book value.[4]

On appeal, Amwest presents several theories under which it contends it is entitled to the damages awarded by the jury.

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[3] We recognize that defendants maintain that the evidence is insufficient to support the jury's verdict.

[4] The district court noted that Amwest received approximately $108 million from Statewide and that the FDIC paid Amwest approximately $142 million. At oral argument, the parties stated that Amwest in effect received approximately $115 million from Statewide. In any event, the FDIC made up the difference between the amount Amwest received for the assets and their book value.

First, Amwest argues that it was obligated under the Assistance Agreement to pursue claims that would minimize losses to the FDIC. Although Amwest elicited testimony from an FDIC officer that Amwest was obligated under the Assistance Agreement to pursue the type of claims at issue here and tender any recovery to the FDIC, Amwest fails to cite any provision in this 113-page document that authorizes Amwest to pursue such claims. Section 7(b) of the Agreement requires Amwest to pursue "Related Claims" and provides that sums recovered from such claims shall be credited to Special Reserve Account I, an account established to effect the provisions of the Assistance Agreement. "Related Claims" are defined as those claims which may result in a recovery by Amwest and which are related to claims for which the FDIC is obligated to indemnify Amwest under § 7 of the Agreement. Pursuant to § 7 of the Agreement, the FDIC is required to indemnify Amwest for only two types of claims: 1) those "based upon a liability, contract or action or failure to act or a status or capacity of any ACQUIRED ASSOCIATION . . . which is asserted against [Amwest]"; and 2) certain actions brought by a party other than Amwest to challenge or set aside a transaction or the Agreement. Amwest's "purchase price" claims are not related to either of these two types of claims.

Second, Amwest argues that the FDIC ratified this lawsuit in a July 12, 1991 letter agreement prior to Amwest's final submission for reimbursement in February 1992. The July 12, 1991 letter agreement apparently provides for the parties to share in any recovery from this action. Even if the FDIC "ratified" this lawsuit by entering into such an agreement, however, its ratification is

meaningless. The fact remains that the FDIC fully and unconditionally reimbursed Amwest prior to trial and that Amwest therefore was unable to show damages as to its "purchase price" claims. Thus, any agreement between the parties as to any recovery on such claims is of no consequence because Amwest had no damages to recover.

Third, Amwest argues that it is entitled to the damages awarded by the jury under the collateral source rule. Under Texas law, medical insurance, disability insurance, and other forms of protection purchased by a plaintiff, as well as gifts received by a plaintiff, are easily identifiable as independent sources subject to the collateral source rule. *See Lee-Wright, Inc. v. Hall*, 903 S.W.2d 868, 874 (Tex.Ct.App.1992). The Restatement (Second) of Torts also identifies insurance policies, employment benefits, gratuities, and social legislation benefits as types of benefits as to which the collateral source rule applies. *See* Restatement (Second) of Torts § 920A cmt. c. The rationale underlying the collateral source rule is that a plaintiff should not be forced to transfer to a wrongdoer a benefit that the plaintiff has either received as a gift or as a result of foresight and planning, as by purchasing insurance or bargaining for employment benefits. *See id.* cmt. b.

Amwest has not cited and we are not aware of any controlling authority that has expanded the collateral source rule to cover sources other than those enumerated above. Amwest argues, however, that the Assistance Agreement is analogous to an insurance policy in that it provided protection against the risk that Amwest would recover less than the book value of the "covered" assets. Although this argument has some superficial appeal, we are not persuaded. The FDIC indeed guaranteed Amwest

the book value of "covered" assets upon the sale of such assets; however, the FDIC was also entitled to split the profit if Amwest sold a "covered" asset for greater than book value. Amwest points to no evidence that the consideration for the FDIC's guarantee was some portion of the price that Amwest paid for the "covered" assets rather than the FDIC's right to participate in any profits realized from Amwest's sale of such assets. Because Amwest has not shown that it paid a "premium" for the FDIC's guarantee, its insurance policy analogy fails. Accordingly, we conclude that the FDIC's reimbursement under the Assistance Agreement is not a collateral source within the meaning of the collateral source rule.

Fourth, Amwest argues that it is entitled to the damages awarded under the doctrine of subrogation. Amwest contends that upon reimbursement the FDIC became subrogated to Amwest's "purchase price" claims and that the FDIC authorized Amwest to pursue those claims on its behalf. Even if Amwest were correct that the FDIC subrogated to its claims, however, Amwest does not cite any provision in the Assistance Agreement that authorizes Amwest to pursue any of the FDIC's claims on its behalf. And contrary to Amwest's assertion, there is nothing in the July 12, 1991 letter agreement that provides such authorization.

Finally, Amwest argues that it is entitled to the damages awarded under *FSLIC v. Reeves*, 816 F.2d 130 (4th Cir.1987). In *Reeves*, FSLIC entered into an agreement with a savings and loan association, Metropolitan, to indemnify Metropolitan for all losses attributable to a merger that FSLIC facilitated between Metropolitan and another savings and loan association, County Federal. In

exchange, Metropolitan agreed to assign, upon request, certain claims of County Federal, and to credit to a special reserve account any recovery on such claims. After obtaining such an assignment, FSLIC filed suit against the former officers and directors of County Federal. The defendants argued that FSLIC lacked standing to pursue the claims against them because Metropolitan had not suffered any injury and thus had no cause of action for losses suffered by County Federal prior to the merger.

The court held that FSLIC could pursue the claims at issue because the only reason Metropolitan had not suffered any injury was that FSLIC had agreed to indemnify Metropolitan in exchange for an assignment of the claims at issue. As the court recognized that Metropolitan had not suffered any injury, however, *Reeves* provides no basis for upholding the jury's damages award in favor of Amwest.

Amwest recites a litany of horrors that will ensue if the district court's judgment in favor of defendants is allowed to stand. We do not agree that affirming the judgment of the district court will, as Amwest claims, "undermine the interests of taxpaying citizens," "reward wrongdoers in every case in which the FDIC entered into an assistance agreement," or allow "tortfeasors against failed banks or their successors . . . [to] wreak havoc upon these institutions without any fear of legal reprisal." The FDIC could have sought to subrogate to Amwest's claims or sought an assignment of such claims to recoup the losses caused by defendants. For reasons best known to the FDIC, it chose not to do so.

Having concluded that Amwest did not show that it suffered any damages and disposed of Amwest's arguments that it is entitled to the damages awarded by the jury,[5] we affirm the district court's judgment in favor of defendants on Amwest's "purchase price" claims.

III.

Prior to the submission of the case to the jury, the district court granted judgment as a matter of law in favor of Statewide on Amwest's claim for the recovery of the $2.8 million "double" credit it inadvertently issued to Statewide in resolution of the dispute between the parties concerning Statewide's purchase of the loans in HSA's portfolio.[6] The court held that because Statewide was not involved in the calculation of the credit, Amwest's math error was a "unilateral mistake" which did not entitle Amwest to relief.

As the district court recognized, a unilateral mistake is not a ground for reformation of an agreement. *See RGS, Cardox Recovery, Inc. v. Dorchester Enhanced Recovery Co.*, 700 S.W.2d 635, 640 (Tex.Ct.App.1985). Amwest does not attempt to challenge the district court's conclusion that it committed a unilateral mistake. Rather, it argues, correctly, that a unilateral mistake accompanied by fraud by the other party will warrant reformation. *See id.*

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[5] Under Texas law, which applies in this case, punitive damages are not recoverable absent recovery of compensatory damages. *See Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 284 (Tex.1993).

[6] Apparently, Amwest was not reimbursed by the FDIC for the $2.8 million "double" credit.

The jury found that Stone fraudulently induced Amwest to issue a $2.8 million credit and that Statewide conspired with Stone to fraudulently induce Amwest to do so. Amwest's $2.8 million math error was made in connection with the issuance of that credit.

Statewide contends that there is no evidence to support the jury's finding that Stone fraudulently induced Amwest to issue the credit. In its April 2, 1996 ruling, the district court indicated that it tended to agree. Although Amwest alleges that Stone misrepresented that Statewide was entitled to the credit, Amwest does not point to any evidence that shows that Statewide was not entitled to the credit as some share of the profit from the sale of the $14 million in loans in HSA's portfolio that HSA sold without Statewide's knowledge and that Statewide believed it had contracted to purchase. Accordingly, we conclude that Amwest is not entitled to relief from its unilateral mistake on the ground that it was accompanied by fraud.

Amwest's reliance on *Community Mutual Ins. Co. v. Owen*, 804 S.W.2d 602 (Tex.Ct.App.1991) to otherwise support its position that it is entitled to recover the "double" credit is misplaced. In *Owen*, an insurance company issued payment for an insured's hospital expenses to both the insured and the hospital. The insured deposited the payment issued to him into his bank account and did not pay the hospital. The court held that the insurance company was entitled to recovery of the payment to the insured because the insurance company had made the payment under a mistake of fact and the insured had not materially changed his position in reliance on the payment. *Id.* at 605.

Unlike the double payment in *Owen*, the double credit in this case was made pursuant to an agreement between the parties in resolution of a dispute. The parties disagreed not only as to whether Statewide was entitled to a credit, but also as to certain other issues that would affect the amount of the credit. Amwest eventually relented and agreed to issue Statewide a credit. Statewide points to evidence that, after Amwest agreed to give Statewide a credit, Amwest calculated the amount of the credit and offered Statewide a closing price based on that credit. Statewide accepted Amwest's offer and wired the funds to close the deal. Amwest, on the other hand, does not point to any evidence that the parties agreed on the methodology for calculating the credit. As Statewide played no part in the calculation of the credit and closed the deal once Amwest offered a closing price based on the credit, it cannot be said that, like the insured in *Owen*, Statewide did not materially change its position in reliance on the credit. Accordingly, we affirm the district court's judgment in favor of Statewide.

IV.

The district court also granted Stone's motion for judgment as a matter of law on Amwest's claim that Stone breached his fiduciary duty to HSA by using his expense account to obtain reimbursement for personal expenses from HSA funds.[7] Amwest argues that in ruling

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[7] The court orally granted Stone's motion on July 3, 1995 during a charging conference. Although the court stated that it would issue a written opinion on the motion, none was forthcoming.

in favor of Stone, the district court erroneously shifted the burden of proof to Amwest. According to Amwest, when a fiduciary relationship exists between parties, equity requires that the fiduciary establish the fairness of a transaction with the principal. Amwest contends that because Stone failed to discharge this burden, the district court should have ruled in its favor.

Amwest relies on two Texas cases in support of its argument. In *Texas Bank and Trust Co. v. Moore*, 595 S.W.2d 502 (Tex.1980), the nephew of an elderly woman caused her to transfer certain property to him before her death. The court concluded that the nephew was the aunt's fiduciary and, as a result, a presumption arose that any gift from the aunt, the principal, to the nephew, the fiduciary, was unfair and invalid *Id.* at 506.

In *Archer v. Griffith*, 390 S.W.2d 735 (Tex.1964), an attorney obtained a deed to real property from his client as compensation for representing her in a divorce case. The court held that because of the fiduciary nature of the attorney-client relationship in existence at the time of the conveyance, a presumption of unfairness or invalidity attached to the transaction. *Id.* at 739.

We do not agree that *Moore* and *Archer* support Amwest's contention that Stone bore the burden of proof on Amwest's expense account abuse claim. Both cases held that fiduciaries who engaged in "transactions" with their principals were required to prove the fairness of those transactions. Neither suggests that anytime a fiduciary is accused of wrongdoing he or she bears the burden of proving otherwise. Stone's alleged reimbursement of personal expenses was a misappropriation of

corporate funds, not a "transaction" in which he engaged with HSA. Accordingly, Amwest bore the burden of proof on its expense account abuse claim. *See Lemons v. Davis*, 306 S.W.2d 224, 227 (Tex.Ct.App.1957) (holding that principal bore burden of establishing fiduciary's misuse or waste of funds). We therefore affirm the district court's ruling in favor of Stone.

V.

For the reasons set out above, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AMWEST SAVINGS ASSOCIATION, et al.,	§	
Plaintiffs,	§	C. A. No.
v	§	H-92-1725
STATEWIDE CAPITAL INC., et al.,	§	
Defendants.	§	

FINAL JUDGMENT

In conformity with the Memorandum Opinion entered April 2, 1996, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiffs take nothing against the defendants.

It is further ORDERED that Defendant Clay Stone take nothing against Plaintiffs. Statewide Capital Inc.'s claims against Plaintiffs are rendered moot by the memorandum opinion.

Each party will bear its own costs.

THIS IS A FINAL JUDGMENT.

The Clerk will provide a copy of this judgment to all counsel.

DONE this 3rd day of April 1996, in Houston, Texas.

/s/ Nancy K. Johnson
NANCY K. JOHNSON
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AMWEST SAVINGS ASSOCIATION, et al.,	)	
Plaintiffs,	)	CIVIL ACTION
	)	NO. H-92-1725
vs.	)	
STATEWIDE CAPITAL INC., et al.,	)	
Defendants.	)	

MEMORANDUM OPINION

CAME ON for consideration Statewide Capital's Motion for Judgment as a Matter of Law (Docket Entry #230), Defendants Stone and Beyerlein's Motion for Judgment as a Matter of Law (Docket Entry #231), Defendant Beyerlein's Motion for Judgment as a Matter of Law (Docket Entry #232), Plaintiffs' Motion for Judgment as a Matter of Law against Clay Stone (Docket Entry #249), Plaintiff HSA's Motion for Judgment as a Matter of Law (Docket Entry #250), Plaintiffs' Motion for judgment on the verdict (Docket Entry #264), Defendant Statewide Capital's Motion for Judgment Notwithstanding the Verdict and for New Trial (Docket Entry #273).

After careful consideration of the motions, the court GRANTS, in part, Defendant Statewide Capital's Motion for Judgment Notwithstanding the Verdict based on the evidence which established that AmWest suffered no damages. The court is dissatisfied with the current state of briefing on the remaining issues, some of which may

have had merit, had the court had available the transcript of the trial. Because this Memorandum Opinion concludes this action in favor of the Defendants, there is no need to require additional briefing and in the interest of judicial economy, the court will decline to resolve all the disputes at this time. Thus, the remaining motions are deemed MOOT.

I.

In this action, Plaintiffs, AmWest Savings Association and HSA Mortgage Company, claim that Statewide Capital, Inc. breached the Asset Purchase Agreement in several respects, and that Gayle Schroder, Clay Stone, Melvin Powers, Joe Long, and Gordon Beyerlein defrauded the AmWest Savings and HSA Mortgage and/or conspired to defraud Plaintiffs. AmWest Savings and HSA also claim that Stone and Beyerlein breached fiduciary duties owing to the Plaintiffs and that the other defendants conspired to breach those fiduciary duties. Defendant Statewide Capital, Inc. counterclaimed for breach of contract. Defendant Clay Stone counterclaimed under the Whistleblower Act and for wrongful termination. The jury awarded judgment in favor of the Plaintiffs on all issues.

While it appears that the jury misapprehended the legal significance of certain facts and was prejudiced by the self-dealing of Clay Stone to the detriment of the other Defendants, it comes to the court to resolve the overriding legal issue clouding the jury's verdict in this case, that being the issue of double recovery by the Plaintiffs.

In entering this judgment as a matter of law pursuant to Rule 50, Fed. R. Civ. P., the court is cognizant of the *Boeing v. Shipman*[1] standard which requires the court to make all reasonable inferences in favor of the non-moving party. In this memorandum, the court will not redetermine credibility issues or second guess the jury. Instead, the court will rely on what appears to be undisputed facts in rendering this decision.

II.

In September-October, 1988, Olney Savings & Loan Association ("Old Olney") entered into an agreement with the FSLIC under the "Southwest Plan" to purchase the assets of ten failed savings & loan associations. At that time, there was insufficient money in the insurance fund of the FSLIC to cover the depositors' funds due to excessive losses in numerous failed associations. Under the Southwest Plan, the Federal Home Loan Bank Board took over the portfolios of insolvent savings and loans and consolidated their management by selling those portfolios to larger savings associations, such as Old Olney.

When Old Olney became insolvent during contract negotiations, NuOlney Savings was formed by the principals of Old Olney to take over the deal. NuOlney acquired the assets of all eleven (the initial ten associations, plus Old Olney) insolvent savings associations. Plaintiff HSA Mortgage was a subsidiary of one of the insolvent associations, BancHome.

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[1] *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*).

On the same day the Assistance Agreement was signed, NuOlney changed its name back to Olney Savings & Loan. Plaintiff HSA Mortgage became a subsidiary of Olney Savings & Loan. Olney Savings & Loan later changed its name to AmWest Savings on February 1, 1990.[2]

AmWest Savings purchased the assets in dispute in this transaction through two comprehensive documents, one the Acquisition Agreement, the other, the Assistance Agreement. Under the Assistance Agreement, AmWest was to liquidate unprofitable assets and manage profitable assets, sharing the revenues with the FSLIC. Pursuant to this Assistance Agreement, AmWest was guaranteed to recover a certain percentage of the book value of the assets upon sale of the asset. If AmWest sold an asset for more than the book value, AmWest would split the profit on that asset with the FSLIC under a formula set out in the Agreement.

Under the Assistance Agreement, the FDIC[3] obtained an option to purchase up to 20% of the stock of AmWest Savings during a five year window commencing ten years

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[2] For purposes of this opinion, the court will refer to the purchaser of the assets as AmWest Savings.

[3] The FSLIC was dissolved after the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) was passed in August, 1989. The Resolution Trust Corporation was formed to take over the liquidation of the assets of insolvent associations previously handled by FSLIC. The FDIC took over supervision of federally insured savings & loans after FIRREA was passed. For purposes of this memorandum, the court will refer to the federal regulator which implemented the Assistance Agreement as the FDIC.

after execution of the Assistance Agreement, at par value [no more than $1.00 per share].

The condition of the poorly maintained books and records of the failed savings associations prevented AmWest and the regulators from conducting an audit of those books. Several months were spent attempting to determine what AmWest had purchased from the government. In the case of Plaintiff HSA Mortgage Co., testimony revealed that the books were in such bad shape that an audit could not be completed.

A government contractor, Ernst & Young, an accounting firm, evaluated the "mobile home assets" of A-1, Inc., A-1 Mobile Homes and HSA in September, 1989, and recommended an immediate bulk liquidation to minimize the loss to the government. The aggregate book value of the mobile home assets was $250 million. That amount, representing the amount of depositor funds invested in the assets, was the maximum which was "covered," or reimbursable, under the Assistance Agreement.

Deloitte & Touche, another accounting firm, appraised the assets as having a fair market value of $115 million. AmWest's counsel, Mark Mesec, stated in a February 22, 1990 letter that the assets had a fair market value of $109 million. So, for example, if the assets sold for $115 million, AmWest would be "covered" for the difference between the sale price and the $250 million book value under the Assistance Agreement – that is, AmWest would receive from the FDIC $135 million dollars for selling the over-valued assets. This business arrangement resulted in a finite loss determination by the

FDIC instead of a lengthy hemorrhage of government money by trying to keep the insolvent businesses afloat.

Ernst & Young developed a plan for the sale of the mobile home assets. A third-party consultant was also hired, Bank Earnings International (BEI), to develop a plan to liquidate the assets as quickly as possible. Serendipitously, money became available within the government to reimburse the depositors' funds to AmWest upon liquidation of the assets and calculation of the loss. The decision to sell the assets was approved by the FDIC.

In December, 1989, the bid process began on the A-1 and HSA assets. Although Statewide Capital submitted the highest bid for the bulk purchase of the assets, even exceeding the FDIC's own estimate of the current fair market value of the assets, the Plaintiffs, acting at the time through Defendant Clay Stone, refused to accept the bid in order to obtain an even higher bid.

Statewide did submit a higher bid[4] which was accepted by the Plaintiffs and approved by the federal regulators. The $126 million dollar bid was subject to a "definitive contract" to be negotiated by the parties after a due diligence period.

Although at least one bid was higher on a partial sale of government-backed loans, Statewide's bid was considered by officials to be the best bid overall because it committed to purchase the stock and all assets of HSA and the A-1 entities, as opposed to the "cherry-picking" bids which just proposed to buy selected, best assets. The

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[4] The second bid was approximately $6,000,000 higher.

Statewide bid was approved by the FDIC and its contractor, Ernst & Young. In fact, Statewide's bid was $11 million dollars higher than the Deloitte & Touche appraisal of the assets' fair market value.

Statewide conducted a due diligence investigation of the assets to be purchased from February, 1990 to May, 1990. This investigation resulted in a slightly lower contract price than the original bid price for the assets. The parties agreed that there would be more than one closing due to the magnitude of the assets conveyed and the difficulty determining what was to be conveyed and its value after the due diligence period. The Asset Purchase Agreement between AmWest and Statewide Capital was signed on June 12, 1990.

The first closing took place on June 12, 1990 and transferred to Statewide 2,024 repossessed mobile home, substantially all of the assets of A-1, Inc., including the stock of A-1 Mobile Homes, Inc., a wholly-owned subsidiary of A-1, Inc., the Mayflower Building in Midland, Texas, and the stock of Basin Credit Consultants.

The second closing occurred on August 31, 1990 and transferred substantially all of the mobile home fixed-rate permanent loan portfolio. At the second closing, AmWest and the federal regulators agreed to delay the sale of the HSA stock and related assets until September 30, 1990, because the necessary regulatory approvals had not been completed.

It was at this second closing that a dispute arose concerning loans earlier sold by HSA to another party which were under contract to Statewide. Statewide claimed it had contracted to purchase all loans in the

HSA portfolio. As HSA had sold $14 million dollars of FHA-backed loans in its portfolio in August, 1990, without Statewide's knowledge or permission, Statewide claimed that part of those proceeds were due to it as a credit on the purchase price for the remaining loans. The dispute was resolved by AmWest's Bobby Laughry giving Statewide a final closing price ($71,239,094.00) which was to have included the "credit" AmWest was willing to give to close the deal. Statewide wired the funds to close the deal.

AmWest later discovered that Laughry had made a $2,852,722 math error, to its detriment, in calculating the amount AmWest was willing to credit.[5] AmWest demanded immediate payment of the money. Statewide refused. Statewide claimed that it overpaid $1.5 million on the first closing and offered to compromise on the difference. AmWest refused, demanding the full amount of the math error before it would close on anything else.

On September 30, 1990, at the third closing, the adjustable rate mortgage portfolio worth approximately $23 million dollars closed for $14 million [$0.615 per $1.00]. AmWest representatives testified that they expected that Statewide would repay them the $2.8 million "math error" at that time, but that repayment did not

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[5] Because Statewide had no participation in the calculation of the credit, and had not agreed on the method to be used to calculate the credit, the court found, as a matter of law, that the math error was a "unilateral mistake of fact" which barred AmWest's claim for breach of contract. The demand made upon Statewide for $71,239,094.00 to resolve the dispute and close the deal amounted to a novation, for which AmWest may not make a breach of contract claim.

occur. AmWest later refused to convey the stock of HSA after regulatory approval had been obtained.[6]

Amwest allowed the insolvent HSA to operate at a deficit until March, 1991, when HSA shut its doors.[7] Additionally, AmWest claimed damages for $1,008,121 in floor plan loans owed by A-1 franchise dealers, A-1, Inc., High Chapparal and Derose franchises.

The FDIC paid AmWest an additional $142 million for the assets under dispute in this matter. As several witnesses testified, with the exception of the $2.8 million dollar "math error," Plaintiffs have received not only the

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[6] Why the HSA stock did not transfer was disputed. AmWest claimed it was because Statewide did not have the funds to buy out the floor plan loans of A-1 required under the A-1 contract. Amwest also claimed that Statewide never was ready to close on the HSA purchase. Statewide claimed that it could not secure financing to purchase the loans without the HSA "Eagles", [the GNMA loan approval capability]. According to Statewide, AmWest refused to transfer HSA because the contract called for HSA to be sold with a net value in excess of $1 million. In order to convey HSA with a positive net worth, AmWest would have been required to write off over $5.5 million in inter-company loans. The FDIC approved the transfer of HSA to Statewide but would not guarantee AmWest that the $5.5 million dollar write-off would be a covered item without a full explanation of how the $5.5 million had been spent by HSA. Statewide contends that because of the possibility that it would not be reimbursed 100% by the FDIC if the sale took place, AmWest took the safe course and stalled the sale of the HSA stock, keeping the losses within HSA and "covered" by the FDIC.

[7] Testimony at trial indicated that HSA incurred $1,399,967 in operating losses from October 1, 1990 to March, 1991.

fair market value for the assets, but they have received the higher book value for the assets liquidated.

III. "One Satisfaction Rule"

Defendants first claim that the "one satisfaction rule" bars judgment in this action because Plaintiffs have been fully reimbursed by the FDIC under the Assistance Agreement for the losses incurred when the remaining contract closing fell through in December, 1990. The one satisfaction rule is based upon the principle that an injured party may not receive more than one recovery for the same injury.

In *Bradshaw v. Baylor University*, 84 S.W.2d 703, 705 (Tex. 1935), the Texas Supreme Court first upheld the "one satisfaction rule." In *Bradshaw*, the plaintiff was injured when a Baylor University bus collided with a train. Plaintiff sued Baylor and the railroad. Plaintiff settled for $6,500 with the railroad and went to trial against Baylor. The jury awarded $6,500 in damages for Plaintiff's injuries. The court stated, "It is a rule of general acceptance that an injured party is entitled to but one satisfaction for the injuries sustained by him." *Id.*, 84 S.W.2d at 705.

Appellate courts have applied the one satisfaction rule when defendants commit the same acts, as well as when the defendants commit technically differing acts, which result in a single injury. *Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1, 7 (Tex. 1991). The practical effect of this rule is to allow a credit of settlement monies received as payment for compensatory damages against actual damages awarded at trial. *See Providence Hosp. v.*

Truly, [illegible] S.W.2d 127, 135 (Tex. Civ.App. – Waco 1980, writ dism'd).

In the present action, the FDIC has made Plaintiffs whole by replacing, dollar for dollar, the deficiency between the book value and the fair market value of the assets. Even so, the court finds that the "one satisfaction" rule is not expressly applicable because the Defendants and the FDIC are not joint tortfeasors.

However, the legal principle which bars a double recovery is applicable here. As discussed below, the court finds that because of the payments from the FDIC, Plaintiffs have suffered no injury from the actions of the Defendants, which has not been compensated at the present time. Thus, the jury award in this action would be a double recovery prohibited by the law.

IV. No Damages

The court concludes that Plaintiffs suffered no damages from the conduct of the Defendants because the FDIC compensated Plaintiffs for the entire amount of their loss prior to the trial of this case.

The jury awarded the following amounts to the Plaintiffs compensatory damages:

Breach of contract –	$1,712,883.00 (HSA unremitted P&I) $1,314,036.00 (Unpaid P&I Adjmnts) $480,339.23 (floor plan losses) $1,399,967.00 (HSA operating losses)
Fraud/ Conspiracy/ – Breach of Fid. Duty	$2,852,722.00 (credit on FHA loans) $2,907,676.00 (lit. reserve offset) $1,399,967.00 (HSA operating loss) $10,000,000.00 (loss F.M.V. assets)

At trial, several witnesses testified that AmWest Savings had been reimbursed for all losses on covered assets. Thus, relative to the damages awarded above, the FDIC reimbursed the Plaintiffs for the $1,712,883 (HSA unremitted principal and interest), $1,314,036 (unpaid principal and interest adjustments) $480,339 (floor plan losses) and $1,399,967 (HSA operating losses).[8] As Plaintiffs have suffered no damages related to the breach of contract, Plaintiffs may not recover these amounts from Statewide.

Turning to the fraud damage award, the theory under which AmWest recovered $2,852,722 was Stone's alleged fraudulent inducement of AmWest to give a credit to the purchase price of the FHA loans under contract with Statewide which HSA had sold earlier that month. As detailed above, HSA had sold approximately $14 million dollars of FHA-insured loans in mid-August, just two weeks prior to the second closing with Statewide. Those

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[8] The only loss sustained by Plaintiffs which apparently was not "covered" by the FDIC was the $2,852,722.00 "math error" made by Bobby Laughry at the time of the second closing. Because the court granted Statewide's Rule 50 motion with respect to that item, this item is not relevant to the present discussion.

loans were part of the package of assets on which Statewide had bid and had contracted to buy for $0.615 on the face amount of the loan.

The testimony at trial showed that the price of $0.615 per $1.00 loaned was based on a bulk sale of the "good, the bad and the ugly" loans in the HSA portfolio. The FHA loans, being guaranteed by the Federal Housing Authority, were considered the "good" part of the transaction. By lowering the percentage of good loans present in the bulk sale, HSA and AmWest had acted to the detriment of Statewide and in apparent disregard of the contract. Statewide demanded the "profit" AmWest/HSA made on the sale.

Clay Stone, president of HSA, argued with AmWest officials in favor of giving Statewide a credit in some amount for the loans which had been sold, as a matter of fairness.[9] The Jury interpreted his actions as fraud in the inducement, in spite of the lack of evidence that Stone made any fraudulent statement which induced the final decision to allow a partial credit towards the purchase price of the remaining loans.

However, regardless of the disputed facts, the court finds that Plaintiffs suffered no injury in this instance because the credit in the purchase price, which in effect, lowered the amount paid on the other loans, was covered by the FDIC when it reimbursed AmWest for the face amount of the loans actually sold at the second closing. AmWest, having recovered $1.00 for every $1.00 loaned,

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[9] The "math error" committed by Laughry in essence gave Statewide the $2,852,722 credit twice.

has not suffered any loss. Thus, AmWest has failed to prove an injury related to the credit given to Statewide at the second closing.

Similarly, the jury's finding that Stone and Beyerlein fraudulently induced AmWest to enter into a contract with Statewide for less that market value by fraudulently estimating a higher litigation reserve amount (for pending litigation related to the purchase of the mobile home assets] than allegedly necessary has not resulted in an injury to AmWest. The litigation reserve, being simply an offset to the total bid price of the assets, had no fair market value standing alone. Because Plaintiffs were reimbursed for the book value of the assets, a higher figure than the market value, an inflated litigation reserve caused Plaintiffs no injury.

Finally, the jury awarded $10 million dollars for the difference between the contract price and the fair market value of the assets actually conveyed to Statewide due to fraud and breach of fiduciary duty. The court seriously questions this item of damage as the evidence showed that assets were put up for bid as a bulk sale, the bid was approved as a bulk sale and the assets were sold in a bulk sale. In the court's opinion, the fair market value must be judged in that context, not simply from the individual sale of the more valuable assets, the price of which would naturally be higher. Nonetheless, because the FDIC has paid the Plaintiffs 100% of the book value for the assets sold, which was higher than the fair market value of the assets, the Plaintiffs have suffered no damage.

A view of the larger picture is also instructive. The testimony at trial indicated that the assets had a book

value of $250 million dollars. According to Cleave Buchanan, AmWest's counsel, who spear-headed the negotiations and closings for Plaintiffs, AmWest was actually paid $108,854,450 by Statewide. AmWest received approximately $142 million dollars from the FDIC, bringing the total paid to AmWest to $250 million dollars, the book value (not the lower fair market value) of the assets. AmWest has not suffered any damage.

Under Texas law, a jury may not award exemplary damages unless it is determined that a plaintiff has also sustained actual damages. *See Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 284 (Tex. 1993); *1488, Inc. v. Philsec Investment Corp.*, 939 F.2d 1281, 1291 (5th Cir. 1991) (if an award for actual damages is erroneous, an award of exemplary damages must necessarily be vacated) *Mack v. Newton*, 737 F.2d 1343, 1363-64 (5th Cir.1984); *Wright v. Gifford-Hill & Co., Inc.*, 725 S.W.2d 712, 714 (Tex.1987). Because Plaintiffs have suffered no compensatory damages, an award of punitive damages would be inappropriate on the fraud, conspiracy and breach of fiduciary duty causes of action.

V.

Plaintiffs argue that the court cannot consider the amounts paid by the FDIC under two separate theories: First, the FDIC payments are a "collateral source" and must be disregarded, and, second, AmWest has standing through the Assistance Agreement to pursue this cause of action on behalf of the FDIC because of its contract obligation to recover the maximum amount for the assets.

A. Collateral Source

The collateral source rule is an exception to the one satisfaction rule, allowing one legally injured to recover as an insured under an insurance policy *and* to pursue a legal recovery in addition to the insurance payment.

AmWest claims that the payments made under the Assistance Agreement should be considered payments from a collateral source because the assets it purchased under the Assistance Agreement came from failed financial institutions which were insured by the FDIC. AmWest claims these institutions paid an unspecified premium into the FDIC/FSLIC fund, thus, the Assistance Agreement payments should be considered to be "insurance proceeds" by the court.[10]

The court rejects this characterization. AmWest was not the insured under the FDIC/FSLIC insurance – the depositor of the funds held by the insolvent institution was the insured. To accept Plaintiffs' argument, the Court would have to assume that the failed institution, as a privately owned, legal entity was insured from loss by the government. This is simply not the case – when a savings association fails, makes a bad business decision or is defrauded, its shareholders sustain a loss which is not compensated by the depositor's insurance. It is simply misleading to characterize the institution as the "insured."

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[10] The court cannot recall any testimony at trial which detailed the nature of these premiums, of if they were paid. However, for the sake of argument, the court will assume Plaintiffs' claims to be correct.

Further, the clear import of the testimony at trial was that the bail out of the insolvent savings and loans by the federal government through the Southwest Plan was borne by the U.S. taxpayer, and did not come from premiums paid by the insured insolvent institutions. Thus, the underlying rationale of the collateral source rule – that a tortfeasor should not benefit from a victim's private insurance – is not present here. AmWest was not the owner of a privately funded insurance policy and cannot claim the benefit of the collateral source rule.

There is no compelling reason to expand this exception to the "one satisfaction" rule under the facts of this case.

B. The Assistance Agreement

AmWest asserts standing to pursue the claims made in this lawsuit by virtue of the Assistance Agreement and the FDIC's "ratification" of AmWest's actions.

According to AmWest, Section 15 of the Assistance Agreement permitted AmWest to pursue litigation with respect to covered assets, upon approval by the FDIC and submission of a litigation plan and budget. Under Section 15(h), the FDIC had the right to monitor and direct the defense or prosecution of the litigation, and to defend against or to prosecute the matter with its attorneys in the name of the Acquiring Corporation [Amwest] or the Corporation (FDIC] or to require the Acquiring Corporation to assign its right, title or interest in such matter to the Corporation.

Plaintiffs also argue that Section 3(b) gives them standing to sue. In fact, Section 3(b) allowed the excess over book value collected by AmWest to be paid back to the FDIC's Special Reserve Account:

> The ACQUIRING ASSOCIATION shall promptly credit each of the following items to Special Reserve Account I, to the extent that such item was not shown as a asset on the Books and Records, as adjusted by the Initial Audit:
>
> * * *
>
> (2) *Covered Asset Amount.* An amount equal to the sum of (i) the excess, if any, of the Net Proceeds Received with respect to a Covered Asset over the sum of (A) the Book Value of such Covered Asset, (B) the amount of any writedown of any Covered Asset pursuant to § 4, and (C) any covered Asset Recovery with respect to such Covered Asset: plus (ii) the product of each Covered Asset Recovery and applicable percentage set forth below:
>
> * * *
>
> (4) *Offset Gains.* The amounts which the ACQUIRING CORPORATION recovers from other than the CORPORATION, whether by counterclaim, offset, insurance settlement, or otherwise, with respect to any Claim or other item with respect to which the ACQUIRING CORPORATION debited Special Reserve Account I.

Defendants read these provisions to apply to the narrow range of assets which were not on the books or were not adjusted by an initial audit. Plaintiffs claim that the section applies to assets originally shown on the

books and records of the failed institutions acquired by AmWest.

A discussion of the language of the Assistance Agreement is not necessary. Even under a broad reading of the Assistance Agreement, the contract cannot, without more, provide a standing for suit by AmWest in light of AmWest's lack of damages. Section 15 of the Assistance Agreement, which allowed the FDIC to monitor and direct the defense or prosecution of a lawsuit cannot be used to circumvent a well-established legal prohibition against the double-recovery of damages or to confer standing where none exists. Although Section 15 gave the FDIC the right to demand that AmWest assign its cause of action, the FDIC failed to obtain such an assignment. Similarly, Section 3(b)'s provision for crediting funds received from insurance or litigation cannot confer standing to sue upon the FDIC or overcome the double-recovery situation present under these facts.

To the extent that the FDIC has paid an incremental amount over what it should have paid under the Agreement, the FDIC has failed to protect itself and the taxpayers by taking an assignment of AmWest's claim and pursuing it. Without an assignment of rights by AmWest to the FDIC at the time of payment, AmWest's claims were extinguished upon being made whole. The record in this case does not reflect an assignment by AmWest to the FDIC or that the FDIC conditioned payment to AmWest upon an assignment of legal rights to pursue the Statewide defendants for any incremental loss.

The alleged after the fact "ratification" by the FDIC of this lawsuit in settlement of AmWest's contemporaneous suit against the FDIC is insufficient to resurrect these

claims of Plaintiffs, which expired upon payment. Plaintiffs' contention that they are now acting on behalf of the FDIC and will pass on any recovery to the FDIC [after keeping 20%] ignores the FDIC's lack of legal standing to pursue such a claim on its own behalf. A collection agent's principal must own the cause of action. Here, the FDIC does not.

Based on the foregoing, Defendants' Motion for Judgment as a Matter of Law and for New Trial is GRANTED in part, MOOTED in part. Plaintiffs' motions for judgment are also MOOT.

DONE in Houston, Texas, this 2nd day of April, 1996.

/s/ Nancy Johnson
NANCY K. JOHNSON
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AMWEST SAVINGS ASSOCIATION, et al.,	§	
Plaintiffs,	§	C. A. No. H-92-1725
v	§	
STATEWIDE CAPITAL INC., et al.,	§	
Defendants.	§	

FINAL JUDGMENT

(Entered Febr. 27, 1997)

In conformity with the Memorandum Opinion entered April 2, 1996, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiffs take nothing against the defendants.

It is further ORDERED that Defendant Clay Stone take nothing against Plaintiffs. Statewide Capital Inc.'s claims against Plaintiffs are rendered moot by the memorandum opinion.

In conformity with the Court's Memorandum Opinion entered February 25, 1997, a new trial is alternatively GRANTED should the court's Memorandum Opinion of April 2, 1996 be overturned.

All other relief sought is hereby DENIED.

Each party will bear its own costs.

THIS IS A FINAL JUDGMENT.

The Clerk will provide a copy of this judgment to all counsel.

DONE this 25th day of February, 1997, in Houston, Texas.

/s/ Nancy Johnson
NANCY K. JOHNSON
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AMWEST SAVINGS ASSOCIATION, et al.,	§	
Plaintiffs,	§	C. A. No. H-92-1725
v	§	
STATEWIDE CAPITAL INC., et al.,	§	
Defendants.	§	

MEMORANDUM OPINION

(Entered Febr. 27, 1997)

CAME ON for consideration Defendant Long's Motion for New Trial (Docket Entry #292), Defendant Beyerlein's Motion to Alter or Amend the Judgment or in the alternative, for New Trial (Docket Entry #294), Plaintiff HSA's Motion for Reconsideration and Motion to Withdraw Final Judgment (Docket Entry #295), Defendant Long's Motion for Judgment as a Matter of Law and for New Trial (Docket Entry #320), Defendant Beyerlein's Motion for Judgment Notwithstanding the Verdict and for New Trial (Docket Entry #321), and Plaintiff AmWest Savings's Motion for Reconsideration (Docket Entry #327).

On April 3, 1996, this court entered final judgment, finding that as a matter of law, Plaintiff should take nothing from Defendants. The parties have filed another round of legal briefs and arguments which the court must address as alternative bases for judgment in this action.

Plaintiffs' Motions for Reconsideration

The court has reviewed Plaintiffs' motions and finds that they do not raise any legal arguments not previously considered by the court. Plaintiffs' motions for reconsideration (Docket Entries ##295 and 327) are DENIED.

Defendants' Motions for New Trial

The decision to grant a new trial is within the sound discretion of the trial court. *See Government Fin. Servs. One Ltd. Partnership v. Peyton Place, Inc.*, 62 F.3d 767, 774 (5th Cir. 1995); *Bank One, Texas N.A. v. Taylor*, 970 F.2d 16, 35 (5th Cir. 1992), *cert. denied*, 508 U.S. 906, (1993); *Treadway v. Societe Anonyme Louis Dreyfus*, 894 F.2d 161, 164 (5th Cir. 1990); *Smith v.. Transworld Drilling Co.*, 773 F.2d 610, 612-13, (1985).

A court has discretion to grant a new trial if misconduct has occurred. Here, Plaintiffs tardily turned over backup documentation to their damage theories immediately prior to trial and in some instances, during trial. The nonproduction of backup documents and newly claimed damage theories were the subject of a Saturday conference with counsel during trial. Even spending hours on that Saturday did not resolve issues which arose in court concerning the experts' reports and what information was relied upon in forming opinions. Plaintiffs included items in evidence which had to be excluded as not relevant. Plaintiffs attempted to utilize various numbers contained in the bid proposals and agreements in their damage calculation without adequate foundation.

The damages portion of this trial suffered from the Defendants' lack of adequate notice of Plaintiffs' damage theories. The pretrial order did not contain a damage calculation. Plaintiffs' experts' reports were vague, failed to attach backup documentation and were cross-referenced to each other. Plaintiffs' experts attempted to add new damage models prior to trial, which were excluded as untimely disclosed. The court allowed Plaintiffs much leeway, assuming that other witnesses would shore up weak or missing testimony on the alleged proximate cause of the claimed damages.

The testimony concerning damages was so confusing that the court was required to ask for clarification concerning what damages Plaintiffs were seeking in the middle of trial. Significantly, it was not produced until several days later. Plaintiffs also claimed damages which were owned by A-1 Inc., an entity sold to Statewide, thereby confusing the jury on the relevant issues in this action.

This trial was estimated to last in excess of one month. Because of the length of trial and scheduling problems with counsel and the court, the trial could not be easily continued when these problems arose. In retrospect, the court was far too lenient with Plaintiffs concerning the lack of backup documentation or documentary support for their summary-type evidence in deference to the trial continuing as scheduled. The cumulative effect of this late production and Plaintiffs' inability to articulate its damage theories until days before the charge conference, was prejudicial to the Defendants.

Additionally, Plaintiffs used their claim that Stone paid for personal expenses with company monies to unfairly discredit Stone. Plaintiffs' expert had to concede that at the end of 1989, the company owed Stone money. However by the end of their case, Plaintiffs were unable to do any more than to show that Stone had rather large amounts of reimbursements, was slow to file with the company receipts accounting for the advances, and resigned before submitting several months worth of receipts for the final reckoning.

While Stone may have owed the company some amount of money, Plaintiffs' lack of proof would have required the jury to speculate on the amounts of the advances/reimbursements which were personal and the court did not allow this issue to be presented to the jury. Plaintiffs' lack of evidence simply underscored the adage that an ounce of prejudice is worth a pound of evidence.

In hindsight, given the mudslinging which occurred in the first few days of trial over this rather insignificant and unrelated claim, the court concludes that this evidence was highly prejudicial to Stone's credibility and thus to the other defendants, and should have been severed from the main case and separately tried with Stone's claim of wrongful discharge and whistleblowing. A new trial without these issues will allow the jury to focus on the dealings between the parties and not on Stone's lifestyle or travel expenses.

Most significantly, the court finds that the jury instructions were fatally flawed on the issue of damages. For example, Interrogatory No. 4, the contract damage instruction, was written in such a way to presume that

the listed elements of damages had been proven and were legally recoverable when the jury first should have been instructed that the proper measure of damages was either the benefit of the bargain *or* consequential damages.

With respect to the damages stemming from Statewide's alleged failure to close on the purchase of the HSA stock, AmWest claimed that Statewide was responsible for all post-breach operating losses incurred by HSA. The jury awarded AmWest over $1.3 million dollars for this operating loss. However, the contract required that HSA be conveyed to Statewide with a positive net worth of at least $1 million dollars. HSA had had a negative net worth since AmWest acquired it as an asset of Banc Home, in late 1988. Since that time, HSA had suffered monthly operating losses, for unknown reasons, which prevented it from paying back money loaned to it by AmWest. These loans were recorded on the HSA books as "unremitted principal and interest" owed to AmWest by HSA. However, had AmWest and Statewide actually closed on the HSA stock, AmWest would have been required to forgive the unremitted principal and interest, estimated to be approximately $5.5 million at the time of the transaction, in order to convey HSA with a positive net worth.

The jury should have been instructed that in either case with respect to the failure to close on the HSA stock transfer, the proper amount of damages should have been the *net* loss incurred by AmWest as a result of the breach of contract, taking into account the unremitted principal and interest that AmWest would have been required to forgive in order to close on the transaction. AmWest

cannot simply claim the post-breach losses of the insolvent HSA as consequential damages, without consideration of the fact that by not transferring the stock, it did not have to forgive a $5.5 million dollar loan.

Turning to the damage instructions relative to Interrogatories Nos. 20-21, the jury should have been instructed in more detail that the damages must have been proximately caused by the alleged fraud. Here, the litigation reserve was simply an offset to the bid price. The larger the litigation reserve, the lower the bid. However, the bid was controlled by Statewide. The proximate cause issue is particularly important on the litigation reserve issue because even if Stone and Beyerlein deliberately misled AmWest concerning their estimate of the amount necessary to resolve the outstanding litigation, the jury should have been instructed that but for the fraud, the amounts *actually paid* for the assets would have been higher. Simply to subtract a low estimate on the cost of litigation from a higher estimate and claim the result as a damage ignores the reality that the litigation reserve was simply an offset in the bid process. The bid process did not set the contract price for any asset, it simply permitted the winning bidder to begin the due diligence period in preparation for concluding a contract which did set a binding price on the assets. Therefore the bidding process itself, being preliminary to the contract, cannot form the basis for a damage calculation in this action. The jury should have been instructed that AmWest had to prove a real injury – a realized loss from the sale of some asset(s). Consequently, Stone and Beyerlein are entitled to a new trial on the issue of fraud relative to the litigation reserve.

The jury instructions also were flawed with respect to Interrogatories No. 39 and 53. Those interrogatories incorrectly asked the jury to assess as damages, "the difference between the fair market value and the price paid on the assets" on the fraud and breach of fiduciary duty claims, respectively. It was undisputed that the federally insured loans contained in the loan package under contract to Statewide were worth more than the other uninsured, defaulted, or slow-pay loans also contained in the loan package.[1] The price bid by all bidders reflected an average price of all loans, based on the composition of the loan pool *at the time of the bid*.

Therefore, the jury should have been instructed that the fair market value of the assets was to be determined on a bulk sale basis, not on an individual "cherry-picked" basis because that was the basis for AmWest's acceptance of the bid. AmWest cannot accept a Statewide bulk sale bid of 61.5 cents on the face value of $1.00, [the highest bid received at the close of bidding in 1989] and then claim fraud when the more valuable loans were pooled and resold at a profit by Statewide, ignoring the potential loss from the remaining poor risk loans.

Thus, Stone is entitled to a new trial on the fraud and breach of fiduciary duty claims relative to damages sought in Interrogatories 39(a) and 53(a).

The Fifth Circuit has held that in the normal case, "[p]artial new trials should not be resorted to 'unless it

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[1] AmWest, in fact, twice sold the more valuable loans out from under Statewide at a higher rate than the 61.5 cents on the dollar, once before the contract was signed, and once after.

appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.' " *Colonial Leasing of New England v. Logistics Control In'l.*, 770 F.2d 479 (5th Cir. 1985) (quoting *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931)).

Because the issues of breach of contract, fraud, fraud by omission, breach of fiduciary duty, negligent misrepresentation, conspiracy and punitive damages are so interwoven with each other, a new trial is ordered on all issues and all parties except the $2.8 million dollar "math error," the counterclaims of Clay Stone and AmWest's claims of expense account abuse by Stone.

In light of the foregoing, the court alternatively GRANTS a new trial on the contract, fraud, breach of fiduciary duty, conspiracy, negligent misrepresentation, fraud, fraud by omission and punitive damage claims of all parties, excepting the counterclaims of Clay Stone, AmWest's claims against Stone for expense account abuse, and the $2.8 million dollar "math error," should the court's Memorandum Opinion of April 2, 1996 be overturned on appeal.

All other relief sought is hereby DENIED.

DONE in Houston, Texas, this 25th day of February, 1997.

/s/ Nancy Johnson
NANCY K. JOHNSON
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20252

AMWEST SAVINGS ASSOCIATION; HSA MORTGAGE COMPANY

Plaintiffs - Appellants

v.

STATEWIDE CAPITAL INCORPORATED; GAYLE SCHROEDER; CLAY STONE; JOE LONG; GORDON BEYERLEIN; MELVIN LANE POWERS

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

(Filed Aug. 13, 1998)

Before POLITZ, Chief Judge, and DAVIS and DUHÉ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge
REHG-2

ASSISTANCE AGREEMENT

AMONG

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,

THE ADAM CORPORATION/GROUP

AND

NUOLNEY SAVINGS ASSOCIATION
OLNEY, TEXAS

ASSISTANCE AGREEMENT

THIS AGREEMENT, dated October 14, 1988, is entered into by and among the Adam Corporation/Group ("ACQUIRER"), a Texas corporation, NuOlney Savings Association, Olney, Texas ("ACQUIRING ASSOCIATION"), and the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a corporate instrumentality and agency of the United States ("CORPORATION").

RECITALS

A. The Federal Home Loan Bank Board ("Bank Board") has (1) authorized the appointment of the CORPORATION as receiver ("RECEIVER") for Olney Savings Association, Olney, Texas ("Old Olney"), Odessa Savings Association, Odessa, Texas ("Odessa"), Banc Home Savings Association, Midland, Texas ("Banc Home"), Southern Savings and Loan Association, Brownwood, Texas ("Southern"), Heart O' Texas Savings Association, San Saba, Texas ("Heart O' Texas"), Petroplex Savings Association, Midland, Texas ("Petroplex"), Southwest Savings

and Loan Association, Abilene, Texas ("Southwest"), San Angelo Savings Association, San Angelo, Texas ("San Angelo"), First Federal Savings and Loan Association of Amarillo, Amarillo, Texas, ("Amarillo"), Security Federal Savings and Loan Association, Pampa, Texas ("Pampa") and Shamrock Federal Savings Bank, Shamrock, Texas ("Shamrock"), (2) authorized the transfer to the ACQUIRING ASSOCIATION of substantially all of the assets and the secured, deposit and certain tax liabilities of Old Olney, Odessa, Banc Home, Southern, Heart O' Texas, Petroplex, Southwest, San Angelo, Amarillo, Pampa, and Shamrock (each individually referred to herein as an ACQUIRED ASSOCIATION and collectively as the ACQUIRED ASSOCIATIONS) pursuant to eleven separate Acquisition Agreements (herein so called) by and between the RECEIVER and the ACQUIRING ASSOCIATION dated the date hereof.

B. The CORPORATION insures the accounts of the ACQUIRED ASSOCIATIONS and the ACQUIRING ASSOCIATION in accordance with § 403 of the National Housing Act ("NHA"), 12 U.S.C. § 1726 (1982).

C. Pursuant to the Acquisition Agreements, the ACQUIRING ASSOCIATION will succeed to substantially all the obligations, duties, and liabilities of the ACQUIRED ASSOCIATIONS to secured creditors, depositors, and governmental units for Tax Claims (defined below), and substantially all assets and property belonging to the ACQUIRED ASSOCIATIONS will be vested in and become the property of the ACQUIRING ASSOCIATION.

D. Immediately upon consummation of the Transaction (defined below), the name of the ACQUIRING ASSOCIATION will become Olney Savings and Loan Association, Olney, Texas.

E. A condition to the obligation of the parties to consummate the Transaction (defined below) is that the CORPORATION and the ACQUIRING ASSOCIATION enter into an agreement in the form of this Agreement, pursuant to which the CORPORATION will provide financial assistance and indemnification to the ACQUIRING ASSOCIATION.

F. The CORPORATION has decided, pursuant to § 406(f)(1)-(4) of the NHA, 12 U.S.C. § 1729(f)(1)(4) (1982), to provide financial assistance and indemnification as set forth in this Agreement, having determined that each of the ACQUIRED ASSOCIATIONS is in danger of default and that the amount of such financial assistance and indemnification with respect to each ACQUIRED ASSOCIATION would be less than the losses the CORPORATION would sustain upon the liquidation of such ACQUIRED ASSOCIATION through a receivership accompanied by the payment of insurance of accounts.

G. The ACQUIRING ASSOCIATION has agreed to consummate the Transaction and to use its best efforts to manage the resulting business, acquired assets and liabilities in order to (i) operate a thrift business in accordance with applicable laws and regulations in effect from time to time; (ii) consolidate operations, reduce operating and funding costs and thereby, to the extent possible under the circumstances, increase net interest margin and profitability; and (iii) liquidate or convert to earning

assets the non-core business and assets of the ACQUIRED ASSOCIATIONS in a manner that will minimize exposure to additional loss and maximize Covered Asset Recoveries (defined below).

In consideration of the mutual promises contained in this Agreement, the parties hereto enter into the following Agreement.

* * *

taken into account in determining Actual Yield and (iii) decreased by any capital distributions paid to the ACQUIRING ASSOCIATION by such Subsidiary and

(C) Book Value of Real Estate Owned shall not be decreased by any depreciation expense.

(3) The following shall not be included in the determination of Book Value:

(A) The amount of any accrued and uncollected interest or late charges on the principal amount of indebtedness related to a Covered Asset that has been accrued through the Effective Date;

(B) The amount of any deferred income related to a Covered Asset, including, without limitation, unearned discounts on loans purchased, unearned profit on real estate sold, deferred loan fees or acquisition credits, unearned discounts on installment loans, deferred gains on securities, and other unearned discounts; and

(C) with respect to any Covered Asset reflected on the Books and Records, any adjustment to the value of

such Covered Asset made solely as a result of the purchase accounting adjustments under generally accepted accounting principles made as a result of the Transaction.

(l) *"Claim"*: Any claim, demand, cause of action or judgment.

(m) *"Common Stock"*: The duly authorized Common Stock par value $1.00 per share of the Acquiring Association.

(n) *"Covered Asset"*:

(1) In the case of any asset on the Books and Records of any ACQUIRED ASSOCIATION other than Old Olney immediately prior to the Effective Date:

(i) Each asset, except as provided in § 1(n)(5) below, acquired by the ACQUIRING ASSOCIATION pursuant to the Acquisition Agreements;

(ii) A loan, contract, or Investment made by the ACQUIRING ASSOCIATION in connection with the sale of or to salvage, a Covered Asset, or any property or interest therein received in exchange for a Covered Asset, if, prior to the making of any such loan, contract, Investment, or exchange of a Covered Asset, the ACQUIRING ASSOCIATION has obtained the CORPORATION's approval in accordance with the requirements of §§ 12, 13 and 14 of this Agreement;

(2) In the case of any asset on the Books and Records of Old Olney immediately prior to the Effective Date:

(i) The following assets acquired by the ACQUIRING ASSOCIATION pursuant to the Acquisition Agreement with Old Olney:

(A) Non-mortgage consumer loans or commercial loans or mortgages on dwellings consisting of 5 or more units, or

(B) except as provided in subparagraph (C), any other loan specified in writing by the ACQUIRING ASSOCIATION, Real Estate Owned, Repossessed Personal

* * *

the Net Proceeds Received by the ACQUIRING ASSOCIATION upon the Liquidation of any Covered Asset.

(p) *"Covered Asset Loss"*: The amount authorized pursuant to the provisions of §§ 12, 13 and 14, (i) by which the Book Value of a Covered Asset exceeds the lesser of Adjusted Book Value or Net Proceeds Received by the ACQUIRING ASSOCIATION upon the Liquidation of such Covered Asset, or (ii) of any write-down in Book Value of a Covered Asset approved by the CORPORATION pursuant to § 4.

(q) *"Covered Asset Recovery"*: The amount by which the Net Proceeds Received by the ACQUIRING ASSOCIATION upon the Liquidation of any Covered Asset exceeds the Adjusted Book Value of such Covered Asset, or, if the Book Value of such asset has been written down with the CORPORATION's permission as provided in § 4 (b), the amount, if any, by which the Net Proceeds Received exceeds the Adjusted Book Value plus the amount of such write-down.

(r) *"Covered Asset Reserve"*: With respect to any Covered Asset, any specific valuation allowance, loan loss, credit loss, or other loss reserve on such asset on the Books and Records as of the Effective Date.

(s) *"Credit"* or *"Credit Item"*: An amount credited to either of the Special Reserve Accounts pursuant to the provisions of § 3.

(t) *"Debit"* or *"Debit item"*: An amount charged or debited to either of the Special Reserve Accounts pursuant to the provisions of § 3.

* * *

(z) *"Initial Audit"*: The audit conducted pursuant to § 5(b) of this Agreement.

(aa) *"Insurance Regulations"*: The Rules and Regulations for the Federal Savings and Loan Insurance Corporation in Title 12 of the Code of Federal Regulations, or any successor rules or regulations.

(bb) *"Investment"*: Any advance, loan, other extension of credit or equity investment.

(cc) *"Liquidation"*: (1) A sale of any Covered Asset, whether for cash or on other terms, other than a foreclosure pursuant to which the ACQUIRING ASSOCIATION or any of its Affiliates acquires title to such Covered Asset; or (2) the release, compromise, satisfaction, settlement, reduction to judgment, or assignment to other than the CORPORATION of any Claim.

(dd) *"Marketable Securities"*: Any asset shown on the Books and Records as a marketable security for which there is a regular trading market and as to which at least

two nationally recognized investment banking firms regularly quote prices.

(ee) *"Negative Capital"*: The amount by which the sum of all secured, deposit, and Tax Claim (defined below) liabilities, including mortgage escrows, assumed by the ACQUIRING ASSOCIATION pursuant to the Acquisition Agreements exceeds the sum of the book values as reflected on the Books and Records (before deduction for any specific valuation allowance, loan loss, credit loss or other loss reserve) of all tangible assets accrued by the ACQUIRING ASSOCIATION, pursuant to the Acquisition Agreements. Notwithstanding the foregoing, the assets and liabilities of old Olney shall not be considered for purposes of determining Negative Capital. For purposes of this section, tangible assets shall mean all assets on the Books and Records except (i) Appraised Equity capital (as defined in § 563. 13(c) of the Insurance Regulations), (ii) Goodwill, (iii) deferred losses on loans and investments, including deferred hedging losses, which have been disposed of by any ACQUIRED ASSOCIATION prior to the Effective Date, and (iv) pre-paid expenses.

(ff) *"Net proceeds Received"*: As used in reference to the amount received upon the Liquidation of a Covered Asset or a Claim, the amount computed by deducting from the gross proceeds received all reasonable expenses in the form of payments to third parties actually incurred or paid by the ACQUIRING ASSOCIATION in connection with such Liquidation, *provided* that such expenses are authorized pursuant to §§ 12, 13 and 14, have not been

reimbursed otherwise and have not previously been capitalized to increase Book Value in accordance with § 1(k)(2)(A)

(gg) *"Promissory Notes"*: The promissory notes initially issued by the CORPORATION to the RECEIVER for Banc Home, Petroplex, San Angelo, Southwest, and Shamrock, and acquired by the ACQUIRING ASSOCIATION pursuant to the Acquisition Agreements and the new promissory note for which such initial promissory notes are to be exchanged pursuant to § 6(a)(1) and the new promissory note for which the initial promissory note is to be exchanged pursuant to § 6(a)(1)(A) and any other note that may be issued by the CORPORATION to the ACQUIRING ASSOCIATION pursuant to this Agreement.

(hh) *"Quarter"*: Three consecutive calendar months, *provided* that the first Quarter during the term of this Agreement shall be deemed to include the period, if any, from the Effective Date to and including the day preceding the first day of the fourth full calendar month following the effective Date, and *provided further*, that the last Quarter during the term of this Agreement shall be deemed to include the period, if any, from the first day after the last day of the last full Quarter (as defined above) during the term of this Agreement to the date on which this Agreement terminates.

(ii) *"Real Estate Owned"*: Any real estate interest held for investment or acquired by Foreclosure.

(jj) *"Related Claim"*: Any counterclaim, offset insurance settlement, or other Claim which may result in a recovery by the ACQUIRING ASSOCIATION and which

is related to a Claim for which the CORPORATION is obligated to indemnify the ACQUIRING ASSOCIATION under § 7 of this Agreement.

(kk) *"Repossessed Personal Property"*: An item of personal property acquired by Foreclosure.

(ll) *"Significant Subsidiary"*: Any Subsidiary acquired by the ACQUIRING ASSOCIATION pursuant to the Acquisition Agreements and with respect to which it has the present voting power to elect a majority of the directors of the managing party or parties.

* * *

(4) The ACQUIRER and the ACQUIRING ASSOCIATION and any of its Affiliates and Subsidiaries within the time periods specified by the terms of this Agreement or by the Bank Board, (A) having executed and delivered to the CORPORATION all other agreements, instruments, filings and documents required to be executed and delivered by the terms of this Agreement and by any action of the Bank Board in approving the Transaction, and (B) having taken all other actions imposed as conditions herein to the CORPORATION's obligation to provide assistance in any action taken by the Bank Board in approving the Transaction;

(5) On the Effective Date, the ACQUIRING ASSOCIATION shall enter into a Warrant Agreement in the form of Exhibit 4 and shall comply with the provisions of the Warrant Agreement and § 6(e) of this Agreement.

(6) The transfer by the ACQUIRER to the ACQUIRING ASSOCIATION of (i) amounts causing the net worth of the ACQUIRING ASSOCIATION to be equal to $65

million on the Effective Date and (ii) an additional $15 million on or before December 31, 1990.

(7) The ACQUIRING ASSOCIATION continuing to fulfill its obligations under §§ 17 and 18 hereof.

§ 3 *Special Reserve Accounts.* The ACQUIRING ASSOCIATION shall establish, as of the Effective Date, two memorandum accounts, with opening balances of zero, to be called Special Reserve Accounts I and II, and shall maintain such accounts solely for the purpose of, and in accordance with, the provisions of this Agreement.

(a) *Debits to Special Reserve Account I.* The ACQUIRING ASSOCIATION may, following the Effective Date, charge as Debits to Special Reserve Account I amounts equal to each of the following items:

(1) *Capital Losses on Covered Assets.* The amount of Covered Asset Losses;

(2) *Indemnifications.* The amounts payable by the CORPORATION under § 7 pursuant to its obligation to indemnify the ACQUIRING ASSOCIATION for the items described in § 7(a) and § 9(l);

(3) *Related Claim Expenses.* The amounts payable by the CORPORATION under § 7 pursuant to its obligation to reimburse the ACQUIRING ASSOCIATION for the reasonable costs and expenses incurred by the ACQUIRING ASSOCIATION in pursuit of a Related Claim pursuant to § 7(b);

(4) *Covered Asset Purchase.* The amount of the purchase price of an asset purchased by the CORPORATION pursuant to § 19;

(5) *Assignment of Acquired Association Claims.* The amount, if any, of the Book Value reflected on the Books and Records of an Acquired Association Claim assigned to the CORPORATION pursuant to § 8;

(6) *Accrued but Uncollected Interest and Late Charges.* The amount of each ACQUIRED ASSOCIATION's uncollected interest and late charges, if any, accrued prior to the Effective Date, at such time as such accrued and uncollected interest and late charges are determined by the ACQUIRING ASSOCIATION, with the written concurrence of the CORPORATION, which shall not be unreasonably withheld, or to be uncollectible and are written off; *provided* that the amounts of such interest and late charges that are subsequently collected shall be credited to Special Reserve Account I upon collection;

(7) *Disallowed Deductions.* The amount permitted to be debited to Special Reserve Account I pursuant to § 9(j).

(8) *Interim Negative Capital Adjustment.* The amount, if any, required or permitted to be debited to Special Reserve Account I pursuant to § 6(a)(1)(B);

(9) *Nonexistent Assets.* The value reflected on the Books and Records of any asset acquired by the ACQUIRING ASSOCIATION and determined by the ACQUIRING ASSOCIATION, with the written concurrence of the CORPORATION, to have been nonexistent or permanently missing as of the Effective Date;

(10) *Purchased Claims.* The amount, if any, paid by the ACQUIRING ASSOCIATION, with the written consent of the CORPORATION, to general creditors of any ACQUIRED ASSOCIATION for the amount of liabilities

and debts not assumed by the ACQUIRING ASSOCIATION pursuant to an Acquisition Agreement; and

(11) *Goodwill Amortization.* The allocable expense, if any, for the amortization over not more than ten years of the amount of goodwill (as of the Effective Date) determined by an audit performed at the ACQUIRING ASSOCIATION's expense in accordance with generally accepted auditing standards and generally accepted accounting principles and approved by the CORPORATION that is attributable to the acquisition from the ACQUIRED ASSOCIATIONS of (i) one-to-four family residential mortgage loans that do not constitute Covered Assets under this Agreement to the extent such goodwill arises from the fact that such loans bear interest at a rate below market rates at the Effective Date; (ii) Marketable Securities; or (iii) purchased servicing.

(12) *Unreflected Deposits.* The amount of any Deposits, as defined in the Acquisition Agreements, which are not reflected as Deposits on the Books and Records of the ACQUIRED ASSOCIATION, but only to the extent that such Deposits are paid by the ACQUIRING ASSOCIATION and are not included as liabilities for purposes of calculating Negative Capital.

(13) *Payment of Credits.* The amount of any payments made by the ACQUIRING ASSOCIATION to eliminate a credit balance in Special Reserve Account.

(14) *Unreflected Tax Claims.* With the prior written approval of the CORPORATION any amount paid by the ACQUIRING ASSOCIATION with respect to tax claims of any ACQUIRED ASSOCIATION in excess of the amount

reflected on the Books and Records as of the Effective Date, as adjusted by the Initial Audit.

(15) *Incentive Payment.* The amount of any Incentive Payment pursuant to § 6(c) of this Agreement.

(b) *Credits to Special Reserve Account I.* The ACQUIRING ASSOCIATION shall promptly credit each of the following items to Special Reserve Account I, to the extent that such item was not shown as an asset on the Books and Records, as adjusted by the Initial Audit:

(1) *Unreflected Assets.* Any amounts attributable to periods prior to the Effective Date received by the ACQUIRING ASSOCIATION, including interest, late fees, penalties, refunds and other recoveries or benefits, which were not reflected as assets in the determination of Negative Capital;

(2) *Covered Asset Amount.* An amount equal to the sum of (i) the excess, if any, of the Net Proceeds Received with respect to a Covered Asset over the sum of (A) the Book Value of such Covered Asset, (B) the amount of any write-down of such Covered Asset pursuant to § 4, and (C) any Covered Asset Recovery with respect to such Covered Asset; plus (ii) the product of each Covered Asset Recovery and the applicable percentage set forth below:

Aggregate Amount of Covered Asset Recoveries After Giving Effect to the Subject Covered Asset Recovery	Applicable Percentage of the Subject Covered Asset Recovery
Under $35 million	90%
$35 million – $70 million	88%
$70 million – $105 million	86%
$105 million – S140 million	84%
$140 million – $175 million	82%
Over $175 million	80%

(3) *Other Recoveries.* An amount equal to eighty percent (80%) of any net gain realized by the ACQUIRING ASSOCIATION upon disposition of assets on the Books and Records of Old Olney immediately prior to the Effective Date which are not Covered Assets ("Non-covered Assets"). For purposes of this subparagraph, net gain shall equal net proceeds received less the sum of book value plus any expenses for payments to third parties and (i) in the case of Non-covered Assets which are loans, the sum of accrued and unpaid interest through the Effective, Date and interest which accrues and is unpaid after the Effective Date for a maximum of ninety (90) days, and thereafter, cumulative Holding Costs or (ii) in the case of Non-covered Assets other than loans, cumulative holding costs. For purposes of § 3(b)(3), net proceeds received, book value, and cumulative holding costs shall be calculated in the same manner as Net Proceeds Received. Book Value, and cumulative Holding Costs are calculated pursuant to §§ 1(ff), k, and (e), respectively.

(4) *Offset Gains.* The amounts which the ACQUIRING ASSOCIATION recovers from other than the CORPORATION, whether by counterclaim, offset, insurance settlement, or otherwise with respect to any Claim or other item with respect to which the ACQUIRING ASSOCIATION debited Special Reserve Account I;

(5) *Tax Benefits.* The amount required to be credited to Special Reserve Account I pursuant to § 9.

(6) *FHLMC Stock.* An amount equal to the excess of the fair market value as of the Effective Date of any Federal Home Loan Mortgage Corporation stock acquired from the ACQUIRED ASSOCIATIONS over the value of such stock on the Books and Records.

(7) *Base Credit for Dividends on Common Stock.* An amount equal to 25% of the dividends paid on Common Stock of the ACQUIRING ASSOCIATION.

(8) *Credit for Extraordinary Dividends Paid on Common Stock.* An amount equal to (i) the Applicable Percentage (as defined herein) multiplied by the sum of the dividends paid on common stock of the ACQUIRING ASSOCIATION during a fiscal year plus the amount to be credited to the CORPORATION for such fiscal year under § 3(b)(7), less (ii) the amount credited to the CORPORATION for such fiscal year under § 3(b)(7) hereinabove. The Applicable Percentage shall equal the "Rate" set forth on the attached Exhibit 3 which corresponds to a decimal fraction, the numerator of which shall be the total dividends paid on the common stock of the ACQUIRING ASSOCIATION for such fiscal year and the denominator of which is the total capital invested or to be

invested for common stock pursuant to § 2(b)(6) of this Agreement.

* * *

(c) *Debits to Special Reserve Account II.* The ACQUIRING ASSOCIATION may, following the Effective Date, charge as Debits to Special Reserve Account II the following:

(1) *Guaranteed Yield Amount.* The Guaranteed Yield Amount for each Quarter, *provided,* that no Debit may be charged to Special Reserve Account II pursuant to this subparagraph with respect to any Covered Asset described in § 1(n)(2)(i)(A) after the last day of the fifth four-Quarter period;

(2) *Actual Loss.* With respect to the Covered Assets for which a Debit to Special Reserve Account II for the Guaranteed Yield Amount was made for any Quarter, the negative amount, if any, of Actual Yield for such Quarter, on such Covered Assets;

(3) *Prepayment of Bank Advances.* The amount of any prepayment penalties the ACQUIRING ASSOCIATION incurs in repaying advances (including repayments for the purpose of rolling over such advances to current market rates) made by the Bank to any of the ACQUIRED ASSOCIATIONS; *provided* that such penalties are incurred for advances repaid by the ACQUIRING ASSOCIATION within 30 days of the Effective Date; and *provided further* that the ACQUIRING ASSOCIATION gives the CORPORATION at least 10 days prior written notice of the payment of any such penalties, and *provided further* that

the amount of such debit shall be net of the present value, calculated by using the same discount rate and other assumptions as the Bank uses in calculating prepayment penalties, attributable to any advances made by the Bank to any of the ACQUIRED ASSOCIATIONS and assumed by the ACQUIRING ASSOCIATION pursuant to any of the ACQUISITION AGREEMENTS which bear an interest rate lower than the Bank's current rate at the Effective Date for advances of a similar type and maturity.

(d) *Credits to Special Reserve Account II.* The ACQUIRING ASSOCIATION shall promptly credit to Special Reserve Account II the following:

(1) *Actual Yield.* With respect to the Covered Assets for which a Debit to Special Reserve Account II for the Guaranteed Yield Amount was made for any given Quarter, the sum of (i) the positive amount, if any, of Actual Yield for such Quarter on such Covered Assets and (ii) in the event of reinstatement of a Covered Asset to income producing status and collection of delinquent interest or other income attributable to a Quarter during which the Guaranteed Yield Amount was paid on such Asset, the amount of such delinquent interest or other income collected.

(2) *Cash Payments for Furniture, Fixtures, Equipment, and Leasehold Improvements.* The amount of any cash payment that otherwise would be made to the Receiver to purchase Furniture, Fixtures, Equipment or Leasehold Improvements pursuant to § 3(b) of the Acquisition Agreements.

* * *

(2) deny the application; or

(3) require the ACQUIRING ASSOCIATION to submit such additional information as the CORPORATION may reasonably request, including, but not limited to, an independent appraisal. Within 30 days after the CORPORATION's receipt of any additional information requested, the CORPORATION shall approve, with or without modifications or conditions, or deny such application.

(d) *Required Sale.* The CORPORATION may at any time require the ACQUIRING ASSOCIATION to sell any Covered Asset to any person or entity the CORPORATION designates, including the CORPORATION, at a price specified pursuant to § 19(a), *provided,* that, except for participation loans and any loans related to Claims held by the CORPORATION, the ACQUIRING ASSOCIATION shall receive notice from the CORPORATION of its intention to require such sale, and the ACQUIRING ASSOCIATION may, within ten (10) days of receipt of such notice, elect to treat such asset as if there had been a Liquidation of such asset under the terms of this Agreement, and such asset shall no longer be a Covered Asset.

(e) *Write-Down of Covered Assets That Could Not Be Liquidated.* With the first Quarterly Report required pursuant to § 16(a) after the ninth anniversary date of the Effective Date, the ACQUIRING ASSOCIATION shall provide a detailed report in a form satisfactory to the CORPORATION with respect to any Covered Asset that has not been the subject of a Liquidation

* * *

Agreement, any Credit or Debit to a Special Reserve Account, or any accounting or report furnished by the ACQUIRING ASSOCIATION under this Agreement shall be subject to adjustment if it is subsequently determined that such contribution, payment, Credit, Debit, accounting, or report was based upon error, or was not computed in accordance with the accounting principles prescribed by this Agreement.

(e) *Warrants.* On the Effective Date, the ACQUIRING ASSOCIATION shall enter into a Warrant Agreement in the form of Exhibit 4 and shall execute and deliver to the CORPORATION a whole number of Warrants (the "FSLIC Warrants") (on the terms set forth in the Warrant Agreement) as set forth in said Warrant Agreement.

§ 7 *Indemnifications and Pursuit of Related Claims.*

(a) *Indemnifications.* To the extent not otherwise reimbursed or reimbursable, the CORPORATION will indemnify the ACQUIRER, the ACQUIRING ASSOCIATION, their directors, officers, and employees, or any of the ACQUIRER's or ACQUIRING ASSOCIATION's Affiliates (collectively, the "Indemnified Parties"), for, and pay as provided in § 6(a), (i) the amounts actually incurred and paid by any Indemnified Party in connection with the satisfaction, settlement or compromise of the following types of Claims and of challenges to the Transaction, and (ii) the reasonable costs and expenses of litigation related to such Claims and to the defense of such challenges to the Transaction, including reasonable attorneys' and accountants' fees, travel expenses, court costs and

related litigation expenses, and such other actual and reasonable costs as may be actually incurred and paid by any Indemnified Party in connection with such satisfaction, settlement, or compromise, *provided*, that nothing in this section shall be construed as indemnifying any person who was a director, officer, controlling person, or employee of Old Olney ("Old Olney Personnel") for any Claim with respect to Old Olney or any of its assets or operations ("Old Olney Claim"), or indemnifying, or obligating the CORPORATION to reimburse, the ACQUIRING ASSOCIATION, the ACQUIRER or any Affiliate of either of them for any indemnification payments made by the ACQUIRING ASSOCIATION, the ACQUIRER, or any Affiliate of either of them to or on behalf of any Old Olney Personnel with respect to any Old Olney Claim, and *provided further* that before such costs and expenses may be debited to Special Reserve Account I, the ACQUIRING ASSOCIATION shall comply in all material respects with the covenants set forth in §§ 17 and 18 and the provisions of § 31 and submit to the CORPORATION, in a form reasonably satisfactory to the CORPORATION the reports and submissions required by §§ 15 and 16 of this Agreement, and *provided further*, that such costs and expenses shall be related to matters subject to indemnification under this § 7(a):

(1) *Unassumed Liabilities and Claims.* Any Claim based upon a liability, contract or action or failure to act or a status or capacity of any ACQUIRED ASSOCIATION (including any Claim based upon a status or capacity of the ACQUIRED ASSOCIATION as the parent of a Subsidiary), which is asserted against the ACQUIRING ASSOCIATION notwithstanding the absence of any assumption

of such liability by the ACQUIRING ASSOCIATION in the Acquisition Agreement relating to such ACQUIRED ASSOCIATION, *provided* however, that the indemnification provided in § 7(a) shall not be made unless the compromise, settlement or satisfaction of such a claim shall have been expressly approved in writing by the CORPORATION.

(2) *Challenges to the Transaction.* Any action brought by any party other than the ACQUIRER, the ACQUIRING ASSOCIATION, or any of their stockholders, Affiliates, Subsidiaries, or creditors (whose action arises in whole or in part by virtue of their capacity as creditors of the ACQUIRER or the ACQUIRING ASSOCIATION) to challenge or set aside the Transaction or this Agreement to the extent that such action is grounded (i) upon the negotiation or execution of this Agreement or any other Agreement relating to the Transaction or (ii) upon a claim that an action or failure to act by the Bank Board or the CORPORATION was not in accordance with the Bank Board's or the CORPORATION's enabling legislation, and, in the event that a court of competent jurisdiction directs the ACQUIRING ASSOCIATION to divest assets or liabilities of any ACQUIRED ASSOCIATION on such ground, the reasonable costs and expenses of such divestiture and any damages due to a breach of contract caused directly by such divestiture, *provided* that such damages are directly attributable to one of the grounds set forth above.

(b) *Pursuit of Related claims.* The ACQUIRER, the ACQUIRING ASSOCIATION and any of their Affiliates shall use their best efforts to reduce or minimize the CORPORATION's indemnity payments under this § 7 by

the pursuit of Related Claims, and the CORPORATION shall indemnify the ACQUIRER, the ACQUIRING ASSOCIATION and their Affiliates for the amount of the reasonable and related costs and expenses, and such other actual and reasonable costs as may be actually incurred and paid by the ACQUIRING ASSOCIATION in complying with this § 7(b), or incurred by an ACQUIRED ASSOCIATION prior to the Effective Date and paid, with the CORPORATION's prior written approval, by the ACQUIRING ASSOCIATION, *provided* that the ACQUIRING ASSOCIATION complies with the covenants set forth in § 17, and *provided further* that the pursuit of Related Claims shall be subject to approval by the CORPORATION and the reports and submissions required by §§ 12, 13, 14, 15 and 16 of this Agreement, in a form satisfactory to the CORPORATION, shall be submitted to the CORPORATION before costs and expenses related to the pursuit of Related Claims shall be debited to Special Reserve Account I pursuant to § 3(a). All sums recovered from each such Related Claim shall be credited to Special Reserve Account I pursuant to § 3(b)(1) of this Agreement. The CORPORATION's right to the recovery on any Related Claim shall survive the termination of this Agreement and shall be paid in cash after such date.

(c) *Scope of Indemnifications.* The indemnifications provided for in § 7(a) above shall not extend to capital losses on or attributable to assets of an ACQUIRED ASSOCIATION.

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to interested third party purchasers (unless the ACQUIRING ASSOCIATION believes, and the CORPORATION

agrees, that financing is otherwise available) without assistance from the CORPORATION, except as provided in §§ 1(n)(1)(ii) and 1(n)(2)(ii).

(e) *Asset Disposition.* At such time as the ACQUIRING ASSOCIATION desires to enter into a contract to sell a Major Covered Asset, it shall submit to the CORPORATION an Asset Sale Request in the form attached as Exhibit 10 setting forth the terms of the proposed sale, together with an Asset Summary in the form attached as Exhibit 6. If the terms of the proposed sale involve financing to be provided by the ACQUIRING ASSOCIATION, the Asset Sale request shall be accompanied by a Term Sheet in the form attached as Exhibit 11, setting forth the terms of such financing. The CORPORATION shall within 30 days after receipt thereof, either approve or disapprove the asset sale request and term sheet.

(f) *Revised Submissions.*

(1) *Annual Revisions.* Not later than two months (or such shorter time period as the CORPORATION in its sole discretion may permit) prior to expiration of the 12-month period covered by each Property Plan, Collection Plan or Business Plan, annual Budget Summary and Asset Summary which has been approved by the CORPORATION, the ACQUIRING ASSOCIATION shall provide to the CORPORATION a revised Property, Collection or Business Plan, annual Budget Summary and Asset Summary for the 12-month period following such expiration.

* * *

may not implement or deduct the unauthorized expense in determining Actual Yield, or increase Book Value by

the amount of a properly capitalizable expense covered by the Specific Request.

(d) *Financing.* In its disposition of Significant Covered Assets, the ACQUIRING ASSOCIATION shall offer financing to interested third party purchasers (unless the ACQUIRING ASSOCIATION believes, and the CORPORATION agrees, that financing is otherwise available) without assistance from the CORPORATION except as provided in §§ 1(n)(1)(ii) and (1)(n)(2)(ii).

(e) *Asset Disposition.* At such time as the ACQUIRING ASSOCIATION desires to enter into a contract to sell a Significant Covered Asset, it shall submit to the CORPORATION an Asset Sale Request in the form attached as Exhibit 10 setting forth the terms of the proposed sale, together with an Asset Summary in the form attached as Exhibit 6. If the terms of the proposed sale involve financing to be provided by the ACQUIRING ASSOCIATION, the Asset Sale Request shall be accompanied by a Term Sheet in the form attached as Exhibit 11, setting forth the terms of such financing. The CORPORATION shall, within 30 days after receipt thereof, either approve or disapprove the Asset Sale Request and Term Sheet

(f) *Revised Submissions.*

(1) *Annual Revisions.* Not later than two months (or such shorter time period as the CORPORATION in its sole discretion may permit) prior to expiration of the 12-month

* * *

do not exceed $50,000 for a particular expense item and $150,000 in the aggregate for all expense items, unless the

ACQUIRING ASSOCIATION submits a Specific Request for Approval of the unauthorized expenditure ("Specific Request") in the form attached as Exhibit 9, together with an Asset Summary in the form attached as Exhibit 6, and such Specific Request is approved by the CORPORATION, or the CORPORATION otherwise waives such requirement in writing. The CORPORATION shall, within 30 days after receipt thereof, either approve or disapprove the Specific Request.

(c) *Financing.* In its disposition of Other Covered Assets, the ACQUIRING ASSOCIATION shall offer financing to interested third party purchasers (unless the ACQUIRING ASSOCIATION believes, and the CORPORATION agrees, that financing is otherwise available) without assistance from the CORPORATION, except as provided in §§ 1(n)(1)(ii) and 1(n)(2)(ii).

(d) *Asset Disposition.*

(1) At such time as the Acquiring Association desires to enter into a contract to sell an Other Covered Asset, it shall submit to the CORPORATION an Asset Sale Request in the form attached as Exhibit 10 setting forth the terms of the proposed sale, together with an Asset Summary in the form attached as Exhibit 6. If the terms of the proposed sale involve financing to be provided by the ACQUIRING ASSOCIATION, the Asset Sale Request shall be accompanied by a Term Sheet in the form attached as Exhibit 11, setting forth the terms of such financing. The CORPORATION shall, within 30 days after receipt thereof, either approve or disapprove the Asset Sale Request and Term Sheet.

(2) Notwithstanding the provisions of § 14(d)(1) above, the ACQUIRING ASSOCIATION may dispose of any Other Covered Asset without submitting an Asset Sale Request to the CORPORATION if:

(A) The ACQUIRING ASSOCIATION has a current appraisal of such asset prepared by an appraiser that has been approved by the CORPORATION;

(B) The ACQUIRING ASSOCIATION disposes of such asset for a contract purchase price of not less than 90 percent of the appraised value of such asset less ordinary and customary sales commissions and other costs; and

(C) The ACQUIRING ASSOCIATION has not incurred and will not incur any costs or expenses, other than those included in the calculation of "other costs" in § 14(d)(2)(B), for the repair, rehabilitation or completion of such asset or any other expenses in connection with such asset that are capitalizable pursuant to § 1(k)(2)(A), or deductible in determining Actual Yield, and, in the case of dispositions based upon the existence of an appraisal, nothing else has occurred, including the passage of time, that would diminish the reliability of or invalidate the assumptions underlying the appraisal or in any way affect the appraised value of such asset.

(e) *Additional Submissions.* The CORPORATION shall have the right to obtain from the ACQUIRING ASSOCIATION (a) additional or revised documents with respect to any Other Covered Asset, and (b) all information and documents reasonably within the control of the ACQUIRING ASSOCIATION or any Affiliate thereof that supports any documents or relates to any Other Covered Asset.

§ 15 *Litigation.*

(a) *Pending Litigation.*

(1) *Litigation Schedule.* Within 20 days after the Effective Date, the ACQUIRING ASSOCIATION shall submit an analysis of the litigation to which each ACQUIRED ASSOCIATION was a party immediately prior to the Effective Date (i) as a plaintiff or, (ii) with respect to a secured liability assumed by the ACQUIRING ASSOCIATION under the Acquisition Agreements, as a defendant, which the ACQUIRING ASSOCIATION believes is significant and the reasons for its determination ("Litigation Analysis") along with a schedule ("Litigation Schedule") of all such litigation to which each ACQUIRED ASSOCIATION was a party immediately prior to the Effective Date that could result in a Debit to Special Reserve Account I. The Litigation Schedule shall be substantially in the form of and shall contain substantially the information required by Exhibit 12. The CORPORATION and the ACQUIRING ASSOCIATION shall consult in good faith regarding the Litigation Analysis and the Litigation Schedule to determine which matters shall be treated as significant litigation matters ("Significant Litigation") for purposes of this § 15. After reaching an agreement as to which matters shall constitute Significant Litigation, the ACQUIRING ASSOCIATION and the CORPORATION shall agree upon a time period within which the ACQUIRING ASSOCIATION shall submit copies of all significant pleadings and dispositive motions relating to Significant Litigation.

(2) *Imminent Proceedings.* Beginning on the Effective Date, the ACQUIRING ASSOCIATION shall use its best

efforts to identify any litigation in which a trial, injunction hearing or other evidentiary hearing is scheduled to occur within 120 days after the Effective Date. The ACQUIRING ASSOCIATION shall submit a preliminary schedule of such litigation of which it has learned, or could have learned through the exercise of due diligence, substantially in the form of Exhibit 12 (with attachments) not later than seven (7) days after the Effective Date and, in any event, prior to the scheduled trial, injunction hearing or other evidentiary hearing.

(3) *Revisions.* After submission, the ACQUIRING ASSOCIATION shall revise the Litigation Schedule required by this § 15(a) on a quarterly basis and shall submit such revised Schedules to the CORPORATION with any required attachments. Revised Litigation Schedules shall include all litigation filed by or against the ACQUIRING ASSOCIATION that could result in a Debit to Special Reserve Account I, a deduction in calculating Actual Yield or an increase in the Book Value of a Covered Asset.

(b) *Litigation Plans and Budgets.* Unless otherwise directed by the CORPORATION, within six months after the Effective Date (or such longer period as the CORPORATION in its sole discretion may authorize in writing), the ACQUIRING ASSOCIATION shall submit for each Significant Litigation matter a litigation plan and budget substantially in the form of and containing substantially the information specified in Exhibit 13 ("Significant Litigation Plan and Budget"). Unless otherwise directed by the CORPORATION, the ACQUIRING ASSOCIATION shall also submit, within the same time period, an Abbreviated Litigation Plan and Budget for litigation listed on

the Litigation Schedule other than Significant Litigation. An Abbreviated Litigation Plan and Budget shall contain an estimate of probable liability or damages, a recommendation with respect to continued prosecution, defense or settlement, and an estimate of legal expenses and other costs by month until resolution of the case. The form and content of a Significant Litigation Plan and Budget and an Abbreviated Litigation Plan and Budget (referred to collectively herein as "Litigation Plan and Budget") may be changed by the CORPORATION after consultation with the ACQUIRING ASSOCIATION.

(c) *Post-Effective Date Litigation.* If, following the Effective Date, litigation is filed against the ACQUIRING ASSOCIATION (i) with respect to a liability assumed by the ACQUIRING ASSOCIATION pursuant to the Acquisition Agreements or (ii) that could result in a Debit to Special Reserve Account I, a deduction in calculating Actual Yield or an increase in Book Value of a Covered Asset, the ACQUIRING ASSOCIATION shall promptly notify the CORPORATION in writing and, within 90 days after such filing, submit a Litigation Plan and Budget to the CORPORATION.

(d) *Plaintiff Litigation.* Before instituting any new action or filing any new Claim in court in an existing action with respect to a Claim which could result in a Debit or Credit to Special Reserve Account I, a deduction in calculating Actual Yield or an increase in the Book Value of a Covered Asset, the ACQUIRING ASSOCIATION shall submit to the CORPORATION a Litigation Plan and Budget.

(e) *Authority Before Approval of Litigation Plans and Budgets.* Within 60 days after receipt of any Litigation Plan and Budget, the CORPORATION shall approve such Litigation Plan and Budget or disapprove all or any portion of such Litigation Plan and Budget and, if appropriate, require the ACQUIRING ASSOCIATION to submit a revised Litigation Plan and Budget in accordance with its instructions. With respect to litigation described in § 15(a), (c) and (d), until the CORPORATION has approved a Litigation Plan and Budget, the ACQUIRING ASSOCIATION shall exercise its best efforts to minimize the cost of such litigation. As such expenses are paid, the ACQUIRING ASSOCIATION may only debit Special Reserve Account I for those amounts which may properly be debited pursuant to § 3, deduct

* * *

amounts are paid, *provided* that in no event shall the aggregate expenses so debited, deducted or capitalized for a particular expense exceed the total amount budgeted for such expense in the Litigation Plan and Budget without the express prior written approval of the CORPORATION.

(g) *Revised Litigation Plans and Budgets.* The ACQUIRING ASSOCIATION shall submit to the CORPORATION for approval revised Litigation Plans and Budgets as necessary to keep the CORPORATION informed on a current basis of its plans concerning litigation. The ACQUIRING ASSOCIATION shall not implement a revised Litigation Plan and Budget until the CORPORATION approves such Litigation Plan and Budget. The CORPORATION shall have the right to require from time

to time submission of additional or revised Litigation Plans and Budgets and to require prompt submission of all information and documents reasonably within the control of the ACQUIRING ASSOCIATION or its Affiliates that supports any Litigation Plan and Budget.

(h) *CORPORATION'S Authority as to Litigation.* With respect to any litigation that could result in a Debit or Credit to Special Reserve Account I, or that could result in an increase in Book Value due to amounts properly capitalized pursuant to § 1(k)(2)(A), or that could affect the computation of Actual Yield, the CORPORATION shall have the right (1) to monitor and direct the defense or prosecution of the matter, (2) to defend against or to prosecute the matter with its own attorneys in the name of the ACQUIRING ASSOCIATION or the CORPORATION, as the case may be, or (3) to require the ACQUIRING ASSOCIATION to assign its right, title or interest in such matter, any defense related to such matter (including any counterclaim or setoff), or the proceeds from such matter to the CORPORATION, *provided,* that the CORPORATION's exercise of such rights shall not affect the rights of the ACQUIRING ASSOCIATION to be indemnified under the provisions of this Agreement. The ACQUIRING ASSOCIATION shall cooperate fully with the CORPORATION in such defense or prosecution, including the furnishing to the CORPORATION of all applicable books, records and other information in the possession or control of the ACQUIRING ASSOCIATION or any of its Affiliates, agents or counsel.

(i) *CORPORATION Approvals.* Any permission or approval of the CORPORATION pursuant to this § 15

shall be effective only if made in writing by the Director, Financial Assistance Division, or his designee.

(j) *Form of Submissions.* The form of Exhibits 12 and 13 and any other submissions for any litigation with respect to which compliance with this § 15 is required may be changed by the CORPORATION after consultation with the ACQUIRING ASSOCIATION.

(k) *Foreclosures and Bankruptcy Actions.* Notwithstanding anything else to the contrary in this § 15, Foreclosures and bankruptcy actions shall be governed by the provisions of §§ 12, 13 and 14 relating to Major and Significant Covered Assets and Other Covered Assets, unless, in the course of

* * *

(iii) The ACQUIRER shall not cause or permit any person who was a member of the Board of Directors of Old Olney immediately prior to the Effective Date to become a member of the Board of Directors of the ACQUIRING ASSOCIATION unless the ACQUIRING ASSOCIATION obtains the prior written approval of the Supervisory Agent.

§ 19 *CORPORATION's Purchase of Covered Assets.*

(a) At any time during the term of this Agreement, the CORPORATION shall have the right to purchase, at a price equal to Fair Market Value and without recourse against the ACQUIRING ASSOCIATION, any Covered Asset that has not been liquidated prior to the ACQUIRING ASSOCIATION's receipt of the CORPORATION's notice that it shall exercise its right to purchase such

Covered Asset, *provided*, that, except for participation loans and any loans related to Claims held by the CORPORATION, the ACQUIRING ASSOCIATION may, within ten (10) days of receipt of such notice, elect to treat such asset as if there had been a Liquidation of such asset under the terms of this Agreement, and such asset shall no longer be a Covered Asset. Such a sale shall be a Liquidation of the Covered Asset.

(b) If such purchase occurs prior to the termination of this Agreement, the purchase price shall be debited to Special Reserve Account I as of the closing date of such purchase. If the closing of a purchase occurs after the date this Agreement terminates, the purchase price shall be paid to the ACQUIRING ASSOCIATION by the CORPORATION in cash within 10 days following conveyance to the CORPORATION of the ACQUIRING ASSOCIATION's right, title and interest in such asset.

(c) In order to facilitate any such sale to the CORPORATION, the ACQUIRING ASSOCIATION shall, at the CORPORATION's request:

(1) Execute and deliver such instruments of sale, grant, conveyance, or transfer and make endorsements without recourse against the ACQUIRING ASSOCIATION in such form and manner, and at such time, as the CORPORATION shall reasonably require; and

(2) Execute and deliver all such other instruments together with all insurance policies, title policies, and title certificates, which the ACQUIRING ASSOCIATION possesses, as shall be deemed necessary, in the opinion of the CORPORATION, to complete such sale, grant, conveyance, or transfer without recourse, *provided*, that any

recording or similar costs of transfer shall be borne by the CORPORATION.

§ 20 *Office Space, Personnel and Facilities for the CORPORATION.*

(a) The ACQUIRING ASSOCIATION agrees to provide the CORPORATION, without charge and for the term of this Agreement, including any extensions thereto, adequate space, including vault space and furnishings, for the CORPORATION's use in connection with the transfers and transactions contemplated by this Agreement. Such space and furnishing shall be adequate to accommodate at least three full-time employees, contractors or

* * *

§ 24 *Termination of Agreement.*

(a) Except as otherwise specifically provided elsewhere in this Agreement, or any Exhibit thereto, this Agreement shall terminate 10 years following the Effective Date or on such other date to which the parties or their successors agree in writing, *provided* that, in the event a receiver is appointed for the purpose of liquidating the ACQUIRING ASSOCIATION, or the ACQUIRING ASSOCIATION ceases, as a consequence of its or any of its Affiliates' actions, to be an institution the accounts of which are insured by the CORPORATION, this Agreement and all of the CORPORATION's obligations under it shall terminate upon the effective date of such occurrence, and *provided further* that the CORPORATION may at its option terminate this Agreement and all of its

obligations hereunder if the ACQUIRING ASSOCIATION fails, after reasonable notice and an opportunity to correct its failure, to use its best efforts to comply with the terms of the Consolidation Plan set forth on Exhibit 1.

(b) Notwithstanding termination of this Agreement as described in § 24(a) above, *provided* that the ACQUIRING ASSOCIATION continues to observe in all material respects after the termination date all covenants, agreements, reporting and other requirements set forth in this Agreement, including any then applicable requirements in §§ 12, 13, 14, 15, 16, 17 and 31, the CORPORATION shall indemnify the ACQUIRING ASSOCIATION for the amount of (i) any items described in § 7(a)(1) and (2) to the extent described in § 7(a), including the reasonable costs and expenses of related litigation actually incurred and paid by the ACQUIRING ASSOCIATION, *provided* that any such item is in litigation on the date that this Agreement terminates, and (ii) the reasonable costs and expenses actually incurred and paid by the ACQUIRING ASSOCIATION in the pursuit of a Related Claim pursuant to § 7(b), and *provided further* that any such Related Claim is in litigation on the date that this Agreement terminates and the CORPORATION approves in writing the pursuit of such Related Claim beyond the termination date, and *provided further* that any recoveries by the ACQUIRING ASSOCIATION on Related Claim described in § 7(b) shall be paid over to the CORPORATION, subject to the limitations of § 6(b), and *provided further* that the obligations of the CORPORATION stated in this § 24(b) shall terminate as stated in the proviso contained in subsection (a) above.

(c) After termination of this Agreement for any reason, the CORPORATION shall thereafter indemnify directly an Affiliate for the amounts set forth in section 24(b) above, *provided* that the Affiliate complies with the provisions of Section 24(b) as if it were the ACQUIRING ASSOCIATION, unless it is impractical for such Affiliates to do so.

* * *

PLAINTIFFS'
EXHIBIT
NO. 579
C.A. NO. H-92-1725

AmWest Savings Association

Mark A. Mesec
Executive Vice President
General Counsel

(Control No. 3573)

Writer's Direct Dial:

(214) 419-3448

July 12, 1991

Mr. James A. Weaver
Regional Manager
Resolution Trust Corporation
5080 Spectrum Drive
Suite 1000W
Dallas, Texas 75248

Re: *AmWest Savings Association v. Statewide Capital, Inc., et al.*, Cause No. 90-065 727, 215th District Court, Harris County, Texas.

Dear Mr. Weaver:

Thank you for your letter dated June 18, 1991, with respect to the above-reference matter (the "Statewide Litigation").

As you are aware I, along with Jay Madrid (trial counsel) and Cleave Buchanan (key fact witness), had an extended meeting in Washington, D.C. with Henry Griffin, Chris Husker, Dan Griffin and Herman Manuel several weeks ago at which time we explained why

AmWest believed that the Statewide Litigation should be fully indemnified. At that meeting we also discussed the facts and circumstances surrounding the $2,850,000 double-credit given to Statewide at the "second closing," and the reasons why such double credit, although a mistake, did not constitute a breach of the management standard contained in the Assistance Agreement. We felt that such a meeting was extremely productive and that all issues were fully discussed and understood.

We are therefore disappointed that your proposal attributes financial responsibility to AmWest for the collection of $1,500,000 of this double-credit. We continue to believe strongly that the actions and conduct by AmWest personnel resulting in the double-credit do not approach the level of mismanagement contemplated by the penal provisions of the Assistance Agreement. While AmWest does not believe that it has the legal responsibility for recovery of the double-credit, we nonetheless appreciate the overall tone of your proposal and your desire to reach a fair accommodation of the respective interests of both AmWest and the RTC. Accordingly, we are prepared to accept your offer of compromise with one minor modification and the clarification of three issues that were not addressed in your letter.

First, we believe that *any* recoveries in excess of $1,500,000 should be applied to reimburse the parties for their respective litigation costs on the basis of 80% to the RTC and 20% to AmWest. Any excess recoveries would then be allocated 100% to the RTC until the RTC's aggregate recovery from the Statewide Litigation, after all legal costs, equals $2,850,000. *For example*, if the total recovery from the Statewide Litigation was $2,200,000 and total

legal costs were $200,000, the recover would be allocated $2,160,000 to the RTC and $40,000 to AmWest.

We believe this modification is consistent with the intent involving the threshold amount that must be recovered (i.e., $1,500,000) prior to the reimbursement to AmWest of its 20% of litigation costs, while at the same time helping to identify the specific circumstances under which all fees will be reimbursed. It seems to us that to eliminate the concept of a discretionary reimbursement of legal fees is in the very best interest of both the RTC and AmWest.

Second, if Statewide makes a settlement offer for $1,500,000 or more, and one party (either AmWest or the RTC) recommends accepting the offer while the other party refuses to accept the settlement offer, then the refusing party should bear 100% of the subsequent legal costs of the Statewide Litigation. In addition, if the refusing party is the RTC, then AmWest shall be entitled to capital loss protection on the entire $2,850,000 receivable from Statewide.

It would be fundamentally unfair for the RTC alone to determine when and if the risk assumed by AmWest (the $1,500,000) can be satisfied by settlement.

Third, AmWest should receive Guaranteed Yield on (or a debit to SRA I of) $1,350,000 of the Statewide Litigation effective the date of the second closing (August 31, 1990). This is the date after which AmWest has had neither the use of the funds nor the yield on the underlying assets. In addition, AmWest shall be entitled to receive Guaranteed Yield on (or a debit to SRA I of) the remaining $1,500,000 of the Statewide receivable in the

event the RTC refuses to accept a settlement offer recommended by AmWest of at least $1,500,000. This would be effective as of the date of the offer.

This is appropriate inasmuch as under any scenario described either in your proposal or herein, AmWest's exposure on the Statewide receivable is limited to $1,500,000. Therefore, $1,350,000 of this receivable must be treated consistently as a covered Asset.

Finally, in consideration for AmWest's agreement to accept responsibility for at least $1,500,000 of the Statewide receivable and to pay 20% of the litigation costs, AmWest should be entitled to retain [20% /s/ jaw] for its own account any portion of the recovery from the Statewide Litigation remaining after the RTC has received $2,850,000, plus its full share of the legal costs incurred.

Again, since Amwest is agreeing to assume substantial "downside" in this matter, while not acknowledging any breach of its management standard, it should likewise be entitled to some "upside" in the event of a recovery in excess of the amount primarily in controversy.

For clarity, I have set forth below AmWest's modified proposal for the handling of the Statewide Litigation and the Statewide receivable:

1. AmWest agrees to waive capital loss protection on the first $1,500,000 of the Statewide receivable, and the RTC agrees AmWest shall have capital loss protection on the remaining balance of the Statewide receivable.

2. AmWest will receive Guaranteed Yield on (or a debit to SRA I of) $1,350,000 of the Statewide Litigation effective the date of the second closing.

3. All recoveries from the Statewide Litigation shall be applied first to that portion of the Statewide receivable for which AmWest has waived capital loss protection. For instance, if the recovery is only $1,000,000, AmWest will not be entitled to receive capital loss protection for $500,000 of the Statewide receivable outstanding after application of the Statewide Litigation recoveries.

4. All recoveries in excess of $1,500,000 shall be applied in the following priority:

   (i) to the RTC (80%) and to AmWest (20%) until the RTC and AmWest have fully recovered the legal costs of the Statewide Litigation; then

   (ii) 100% to the RTC until the RTC has received an additional $1,350,000; then

   (iii) 20% to AmWest, 80% to RTC/DFO.

5. If Statewide makes a Settlement Offer to AmWest and/or the RTC of at least $1,500,000 to settle the Statewide Litigation, and either AmWest or the RTC desires to accept the offer but the other party refuses to accept the offer, then the refusing party shall bear 100% of the legal costs of the Statewide Litigation occurring subsequent to the settlement offer.

6. If the RTC rejects a settlement offer in excess of $1,500,000 which has been recommended by AmWest, capital loss protection shall be restored to the entire Statewide receivable. Further, AmWest shall be entitled to receive Guaranteed Yield on (or a debit to SRA I of) the $1,500,000 – effective the date of the settlement offer – in the event the RTC refuses a settlement offer proposed by Statewide of $1,500,000 or more that is recommended by AmWest.

One final point that AmWest believes strongly must be understood and agreed upon in advance is the realistic assessment and approval by the RTC of the Plan and Budget relating to this matter. It serves no useful purpose here to criticize the response AmWest has received to date from the FSLIC/FDIC/RTC on litigation Plans and Budgets generally; however, given the seriousness of this matter, its complicated features and the unique partnership relationship contemplated herein, AmWest believes this Plan and Budget must be approved so that a prudent and business-like prosecution of this lawsuit may commence as soon as possible. I believe it is in the economic interest of both the RTC and AmWest that this occur quickly. AmWest's proposal, therefore, is necessarily conditioned upon the satisfactory approval of the pending Litigation Plan and Budget.

If the RTC is in agreement with the foregoing solution to the Statewide Litigation and the Statewide receivable issues, please so indicate in the space provided below.

Thank you.

Very truly yours,

/s/ Mark A. Mesec
Mark A. Mesec
Exec. Vice President/
General Counsel

AGREED TO AND ACCEPTED
this 25th day of July, 1991

Resolution Trust Corporation,
Division of FSLIC Operations

By: /s/ James A. Weaver
Regional Manager, RTC/DFO

cc: Mr. Chris Husker
Mr. Dan F. Griffin
Henry R. F. Griffin, Esq.
Herman A. Manuel, Esq.
Mr. Don A. Adam
Jay J. Madrid, Esq.
C. Cleve Buchanan, Esq.

Supreme Court, U.S.
FILED
DEC 18 1998
CLERK

No. 98-797

In The
Supreme Court of the United States
October Term, 1998

AMWEST SAVINGS ASSOCIATION, a Texas state savings and loan association, and HSA MORTGAGE COMPANY,

Petitioners,

v.

STATEWIDE CAPITAL, INC., GAYLE SCHRODER, CLAY STONE, MELVIN POWERS, JOE LONG, and GORDON BEYERLEIN,

Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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8 pp

QUESTION PRESENTED

Under Texas law, does an agent have an implied right to recover, in its own name, damages suffered by its principal, when

- the agent took no risk and suffered no loss, and
- the principal's damages were caused by the agent's sub-agent and thus are attributable to the agent itself ?

RULE 29.6 LIST

Respondent Statewide Capital, Inc. has no parent company and has no non-wholly owned subsidiaries.

OPINION BELOW

The opinion of the Court of Appeals is reported at 144 F.3d 885 (5th Cir. 1998).

STATEMENT OF THE CASE

The District Court and a unanimous panel of the Fifth Circuit correctly concluded that AmWest failed to prove that it had suffered any damages, and that AmWest was not entitled to pursue, in its own name, any claim for damages which may have been suffered by the FDIC. The opinions of the District Court (App. 19) and the Fifth Circuit (App. 2) accurately set forth the factual background of the case. The key facts are as follows:

- AmWest held the mobile home assets which were the subject of the action as liquidating agent for the FDIC.[1/] (Pet. 3.)

- Respondent Statewide Capital, Inc. bought the assets after making the high bid in a sealed bid auction; the FDIC supervised the auction and approved its result. (App. 22.)

- The FDIC retained outside contractors to conduct a detailed appraisal of the asset package as a whole. (App. 21.)

- Statewide's bid was greater than the fair market value for the asset package as a whole, as established by the FDIC's outside contractors. (App. 23.)

1/ While AmWest now concedes that it was acting as liquidating agent for the FDIC, it came to this position late in the day. AmWest did not try the case on this theory.

- There was no evidence that, but for any act or omission of any defendant, Statewide or anyone else would have bid or paid more for the asset package.

- AmWest took no risk and it suffered no loss. (App. 6, 27.)

- AmWest was not authorized, by the Assistance Agreement or otherwise, to sue in its own name to recover damages suffered by the FDIC.[2/] (App. 7, 8, 35.)

- AmWest's conflict of interest would in any event have disabled it from any attempt to sue on behalf of the FDIC. AmWest's central claim was that the damage was caused by the wrongful acts of Mr. Clay Stone, who was "hired [by AmWest] to manage and dispose of certain covered assets." (Pet. 4.) Because AmWest was the agent of the FDIC for this purpose, and Stone was its sub-agent, Stone's acts or omissions were chargeable to AmWest; it would have been liable to the FDIC for any damage caused thereby; and accordingly it could not have sued on behalf of the FDIC to recover damage caused by its own agent or employee.

[2/] Respondents do not concede that the FDIC — which chose not to sue — was, in fact, damaged. The District Court "seriously question[ed]" AmWest's primary damage theory (App. 30), and it provisionally ordered a new trial because "the jury instructions were fatally flawed on the issue of damages." (App. 42.)

REASONS FOR DENYING THE WRIT

The Petition fails to set forth any "compelling reason" to review the decision of the Fifth Circuit, and indeed there is none. The Fifth Circuit opinion is not in conflict with the decision of any other Court of Appeals. No important federal question is involved.[3] Neither the District Court nor the Fifth Circuit departed from the accepted and usual course of judicial proceedings. At bottom, Petitioners urge this Court to grant *certiorari* to review whether, on this fact-intensive record, the lower courts wrongly applied established principles of Texas law.

There is no substance to AmWest's suggestion that the "lower courts' rulings have particular significance beyond the parties and claims in this proceeding." (Pet. 5.) The facts of this case are highly unusual, if not unique.[4] Rarely does an agent (AmWest) assert the right to sue for damages inflicted on the agent's principal (FDIC) by the agent's own employee (Clay Stone). Nor is there merit to AmWest's assertion that this decision will "totally undermine" the framework for the orderly liquidation of failed financial institutions. The FDIC had the right to sue if it believed it had been damaged. Its right to sue in future cases has not been diminished in any way by the decision herein. The FDIC also had the right

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[3] Indeed, *no* federal question is involved here. This case was originally filed in state court in Texas. It was removed on the basis of federal question jurisdiction arising from issues which are not raised by the Petition. The issues raised in the Petition — the proper construction of the contract and issues of subrogation and collateral source — were and are matters of state law which were tried under the District Court's supplemental jurisdiction.

[4] AmWest and the FDIC themselves recognized that this matter was "unique." (App. 90.)

under the Assistance Agreement to refuse to reimburse AmWest for losses caused by AmWest's own mismanagement, including losses caused by the wrongful acts of its agents and employees. While the FDIC did not exercise this right in this case, its right to do so in future cases remains intact.

AmWest's reliance on *Federal Savings and Loan Ins. Corp. v. Reeves*, 816 F.2d 130 (4th Cir. 1987), is misplaced. In *Reeves*, the Court of Appeals held that the FSLIC could sue to recover damages it had sustained as a result of wrongdoing committed by officers of the failed savings institution (County), prior to its failure. *Reeves*, however, did not hold that the acquiring institution (Metropolitan in that case; AmWest here) could sue in its own name. Nor did *Reeves* involve wrongdoing, after the transfer of assets to the acquiring institution, by an officer of the acquiring institution. Thus, as the Fifth Circuit correctly held, "*Reeves* provides no basis for upholding the jury's damage award in favor of AmWest." (App. 10.)

Finally, the decision below was correct. The lower courts properly applied state law in holding that AmWest suffered no harm, and that the Assistance Agreement did not authorize AmWest to sue on behalf of the FDIC. The FDIC was fully able to protect its own interests, yet it chose not to sue. No further review is warranted.

CONCLUSION

For the foregoing reasons, AmWest's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Of Counsel:
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December 16, 1998